2011

Debra Brown v. State of Utah : Brief of Appellant

Utah Court of Appeals

Case No. 20110481-SC

IN THE

UTAH SUPREME COURT

DEBRA BROWN,
Petitioner/Appellee & Cross-Appellant,

vs.

STATE OF UTAH,
Respondent/Appellant & Cross-Appellee.

Brief of Appellant

State's appeal from an order granting a petition for a post-conviction determination of factual innocence and vacating a conviction for aggravated murder, a capital felony, in the Second Judicial District Court, Weber County, the Honorable Michael D. DiReda presiding

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JURISDICTION STATEMENT

The State appeals from an order granting a petition for post-conviction determination of factual innocence and vacating a conviction for aggravated murder, a capital felony. *See* UTAH CODE ANN. § 76-5-202. This Court has jurisdiction under UTAH CODE ANN. § 78A-3-102(3)(i).[1]

STATEMENT OF THE ISSUES

To state a claim of factual innocence, a petitioner must specifically identify newly discovered material evidence that "establishes" her factual innocence and then allege that, "viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent." UTAH CODE ANN. § 78B-9-402(2)(a)(i), (ii), & (v). "Newly discovered material evidence" is "evidence that was not available to the petitioner at trial." *Id.* § 78B-9-401.5(3).

[1] Unless otherwise noted, all statutory citations are to the current version.

1. Did the post-conviction court erroneously interpret the statute to allow a factual innocence determination based on evidence both known and available to Petitioner at trial?

Preservation: The State preserved this issue at PCR.2254:12-13; 2255:7-12; 2257:149-52, by arguing that Petitioner's evidence was not newly discovered and therefore could not support a factual innocence determination.

2. Did the post-conviction court erroneously conclude that Petitioner had demonstrated her factual innocence by clear and convincing evidence?

Preservation: The State preserved this issue at PCR.2258:83-107; 2261:64-71, by arguing that Petitioner did not meet her burden.

Standard of review for both issues. A post-conviction court's legal conclusions are reviewed for correctness and its factual findings for clear error. *Tillman v. State*, 2005 UT 56, ¶ 14, 128 P.3d 1123.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are in the addenda:

Addendum A—Factual innocence part (2010 version)—UTAH CODE ANN. § 78B-9-401 to -405 (West Supp. 2011);

Addendum B—Factual innocence part (2008 version)—UTAH CODE ANN. § 78B-9-401 to -405 (2008);

Addendum C—Post-Conviction Remedies Act (remaining parts current version)—UTAH CODE ANN. § 78B-9-101 to -304 (West 2009 & West Supp. 2011).

CASE AND FACT STATEMENT[2]

On the morning of Sunday, 7 November 1993, Petitioner Debra Brown called 911 to report that she had found her employer, Lael Brown, dead in his bed. TR.695, 1302, 1327. The sleeping, 75-year-old Lael had been shot three times in the head, most likely with his own .22 caliber pistol. TR.257, 746, 1451-52, 1461-63.

At a 1995 jury trial, the State proved beyond a reasonable doubt that only Petitioner had access, opportunity, and motive to kill Lael. TR.1566-69, 1597-1600. Petitioner's access and opportunity were undisputed—she had a key to Lael's home and no alibi for several hours on the Saturday Lael was likely murdered. TR.621-22, 625-29, 637-38, 734, 751-53, 806. As for her motive, other than Lael Brown's cash-stuffed wallet and the murder weapon itself, the murderer removed only one thing from Lael's house: some of his bank records, including several canceled, forged checks, all payable to and indorsed by Petitioner. TR.685, 702, 736-39, 740-44, 756, 782-99, 852-63, 882, 1310, 1382, 1450-52. Although Petitioner denied it at the time, she now admits that she forged the missing checks. PCR.2257:74-75.

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[2] The nature of this case requires an unusually long case and fact statement. The State must explain the evidence from Petitioner's five-day trial, five-day factual innocence evidentiary hearing, and hundreds of pages of exhibits, and then summarize the post-conviction court's 46-page ruling. *See* UTAH CODE ANN. § 78B-9-404(3) (requiring post-conviction court to consider evidence at factual innocence hearing in light of trial record).

The appellate record includes the trial record, First District case no. 951100097, and the post-conviction case record, which began as First District case no. 090100583 and became Second District case no. 100903670. The State refers to the trial record as "TR" and uses the page numbers as that record was paginated on direct appeal. The State refers to the post-conviction record as "PCR."

1995 Trial Evidence

Petitioner's Motive

Lael, Clara, and Debra Brown. Lael Brown was the ex-husband of Clara Brown; he also worked as her property manager. TR.574 [25].[3] Both owned apartments. TR.575 [26]. Both employed Petitioner Debra Brown (no relation) to do painting, cleaning, and general maintenance. TR.578 [29]. And both had loaned Petitioner money. TR.580-81 [31-32], 833. By the time of the murder, Petitioner was behind on her agreed-upon monthly payments to Clara. TR.580-81 [31-32].

Bank statement with Petitioner's forged, canceled checks arrives. Testimony from bank and postal employees established that Lael probably received his October 1993 bank statement on Wednesday or Thursday or, at the latest, Friday, 5 November 1993. TR.767-68, 773, 776. This statement would have contained several canceled, forged checks payable to and indorsed by Petitioner. TR.782-99 852-63, 882.

The trial evidence did not establish whether Lael inspected this bank statement. But the jury was not permitted—on hearsay grounds—to hear Clara's preliminary hearing testimony that during a telephone conversation on 3 November 1993, Lael asked Clara if Petitioner had been "'cleaning her bank account out as she had his.'" TR.500,

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[3] In assigning record numbers to trial transcript volume 3, the clerk inadvertently duplicated some numbers. The transcript pages 11-50 and 51-90 are both marked with record numbers 560-599. Therefore, "TR.560 [25]" indicates record page 560, transcript volume 3 page 25.

595-99 [46-50].[4] The jury did hear, however, that while Lael was a trusting person, if his trust was violated he was likely to confront the wrongdoer and probably pursue legal action. TR.728.

Time of the Murder

Petitioner spent Friday night at the home of her boyfriend, Brent Skabelund. TR.614, 616, 619-21. Skabelund heard her in the bathroom at 6:30 a.m. Saturday, and heard her vehicle drive away at about 6:40 a.m. TR.621-22, 627. He did not see Petitioner again until after 10 a.m. that morning. TR.625-29.

Neighbor hears two gunshots. At 7:05 a.m. that Saturday morning, Lael's neighbor Paulette Nyman was taking a bath. TR.578-81 [69-72]. As she raised her head from the water after rinsing her hair, she heard two clear pops that sounded like shots from a small caliber firearm. TR.582 [73], 585 [76], 592-93 [83-84]. She finished her bath and called her dogs, who were on the stairs towards Lael's house. TR.583-84 [74-75].

Nyman was "98, 99 percent" certain that she heard the shots on Saturday, and not Sunday, because her husband had a friend over for breakfast on Sunday and she would put the dogs outside when company came. TR.586-87 [77-78]. But Nyman also acknowledged that she had earlier told a defense investigator that she thought she heard the shots on Sunday morning. TR.590-92.

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[4] This testimony, whether or not hearsay, was admissible at the factual innocence hearing. *See* UTAH CODE ANN. § 78B-9-404(2)(b).

Lael does not appear for regular morning coffee. Lael had a habit of having coffee at a restaurant named "Angie's," from about nine to ten o'clock every morning. TR.672, 676-77, 688-89. But this Saturday he was not seen there. TR.690, 693-94.

Lael does not return to complete promised repairs. Lael had promised a tenant that he would return on Saturday to finish repairing a hot water leak. TR.554-56. Lael began the repair the previous evening, but left around 7:30 p.m. because he needed additional parts to finish the job. TR.554-56. Lael never returned. TR.556 [7]. This surprised the tenant because the leak was wasting a lot of money. TR.556-57 [7-8].

Lael does not answer his phone all day on Saturday. Clara Brown normally called Lael every Saturday morning; he was almost always home. TR.575-76 [26-27], 584-85 [35-36]. However, on this Saturday, Clara called him "[q]uite a number of times" without receiving an answer. TR.577-78 [28-29]. Puzzled, she called Petitioner around 9:55 a.m. to see if she knew where Lael was. TR.582-83 [33-34]. Petitioner said Lael was sick. TR.583 [34]. Clara asked Petitioner to check on Lael and call her back if he was "really sick." TR.583 [34], 599 [50]. Clara never heard back from Petitioner. TR.583 [34].

Lael's granddaughter, Jennifer Nielsen, testified at the preliminary hearing that she called Lael several times on Saturday to remind him that her baby would be blessed on Sunday. TR.1692-93. Lael never answered. TR.1693. Nielsen did not testify at trial.[5]

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[5] Her testimony was admissible at the factual innocence hearing. *See* UTAH CODE ANN. § 78B-9-404(3) (requiring court to consider criminal case record).

Lael's truck is parked in front of his house all day on Saturday. One of Lael's neighbors, Kimberly Standridge, was painting outside her home between 10 a.m. and 4:30 p.m. that Saturday. TR.596 [87]. She did not see Lael all day. TR.597-98 [88-89]. She thought this unusual because Lael's truck was in his driveway and he was "always tinkering out on his lawn or doing something. You could see him pretty much if he was home all day." TR.597-98 [88-89]. Standridge also heard Lael's phone ring several times throughout the day, and ringing long enough that it seemed to her that no one was answering it. TR.597 [88]. Although she heard Lael's telephone, she did not hear any gunshots. TR.613.

Petitioner is seen at Lael's house twice on Saturday. Although she did not see Lael all day, Standridge saw Petitioner visit Lael's house twice that Saturday—once around noon and again around 2 or 3 p.m. TR.598-600 [89-91]. When Standridge saw Petitioner at noon, the two made eye-contact and Petitioner waved. TR.598-600 [89-91].

Jennifer Nielsen also testified at the preliminary hearing that she drove to Lael's home around 11:15 or 11:25 a.m. on Saturday to borrow a drill. TR.1687-89. She decided not to stop when she saw Petitioner's truck there. TR.1689-90. Instead, she bought a drill. TR.1690-92. Her receipt, dated 6 November 1993 at 11:45 am, was admitted at the factual innocence hearing. PCR.Petitioner's Exhibit 2, Tab 70, p.201. Petitioner's truck was still at Lael's when Nielsen drove by on her way home. TR.1691-92.

Petitioner calls police. In response to Petitioner's call, police responded to Lael Brown's home at about 8:45 a.m. on Sunday, 7 November 1993. TR.695, 1302, 1327.

They found Petitioner sitting on the porch crying hysterically, or at least showing "the outward signs of someone upset and shaking and crying." TR.695, 705, 708, 1302, 1327-28, 1343. Although Petitioner was "having a difficult time breathing, hyperventilating type of thing," her eyes were not watering and she did not need a Kleenex. TR.1374.

Medical Examiner estimates that Lael was murdered between Friday night and 3 a.m. Sunday morning. Lael had "been dead for some time," according to the first officer on the scene. TR.1303. An investigator for the medical examiner's office estimated that death occurred between 9 p.m. Friday and 3 a.m. Sunday. TR.1404-06, 1430. The medical examiner testified that the physical findings "were most consistent or most typical" of a time of death around 9 p.m. on Saturday, but that this time was subject to "association factors" such as when the decedent was last seen alive, breaks in the decedent's regular routines, and so forth. TR.1476-79. The medical examiner was comfortable placing the time of death anywhere between 9 p.m. on Friday November 5th and 3 a.m. on Sunday November 7th. TR.1489. In his experience, a time of death estimate "is at best an educated guess" and he had "been fooled many times." TR.1476.

The Crime Scene

Lael was lying in bed with his blanket and sheet pulled up to about shoulder height. TR.1304. His wallet, which typically contained large amounts of cash, was missing. TR.702, 744, 1310, 1382.

Three spent .22 caliber shells and four live .22 cartridges were found near the body. TR.1317-18, 1322, 1379-80. The murder weapon was a Colt Woodsman .22 pistol

or similar model. TR.1450-52. Lael owned a Colt Woodsman, which he kept loaded in his bedroom. TR.736-39, 756. It was missing after the murder. TR.697 [188], 736.

Lael's front door was always locked; in fact, it locked automatically upon closing. TR.587 [38], 673, 686, 733. A lock and a dead bolt secured it. TR.1336. The back door was wedged shut with a knife stuck between the door and the jamb. TR.1336. The windows in Lael's home appeared to have been painted shut and looked like they had not been opened "in years[]." TR.1336. There were only two keys to the home; Lael had one and Petitioner had the other. TR.734, 751-53, 806. A few months earlier, she used it to paint and clean while Lael was on a fishing trip in Wyoming. TR.685, 809, 1337.

The home showed no signs of forced entry, nor did it appear to have been ransacked or otherwise burglarized. TR.804, 1335-36. Typical burglary targets such as radio, television, and VCR were not taken. TR.1336.

Petitioner's Statements

Petitioner told police that at about two o'clock the previous day (Saturday), she had brought a pot of chicken soup to Lael, who had been sick. TR.1326. She said she returned on Sunday morning to check on Lael and noticed that the soup was still on the porch. TR.1326. After knocking on the door without response, she went back to her truck, got her key, and opened Lael's door. TR.1326, 1368. She said she went into the bedroom, saw Lael, touched him, felt that he was cold, and ran from the house yelling for help. TR.1326-27. She then returned to the house and called 911. TR.1327.

When Clara Brown learned of Lael's death on Sunday morning, she called Petitioner. TR.593 [44]. Petitioner said, "The police think that he committed suicide, but I think he was murdered." TR.594 [45].

Petitioner originally said that she left the soup on the front porch because she did not want to disturb Lael; she later told police she thought he was gone and did not want to go inside. TR.835-36, 1326. Petitioner did not testify at trial; her statements came in through police. TR.835-36, 1326.

Forged Checks

On Lael's dining room table were bank statements, boxes of checks, some bills, and insurance statements. TR.1323, 1383. However, Lael's checkbook, his October bank statement, and canceled checks from earlier statements were missing. TR.740-43. Lael's family had no difficulty locating and organizing his bank statements from other months because of his "extremely complete" financial records. TR.575-76 [66-67], 699, 739-40. According to bank microfilms, missing checks included five totaling $2970, made out to and indorsed by Petitioner. TR.791-98. All, with one possible exception, were forged; the forgery was committed by tracing over signatures on authentic checks. TR.791-99, 852-63, 882. Another canceled, forged check for $600, also payable to Petitioner, arrived in Lael's December 1993 bank statement. TR.798-799, 863.[6]

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[6] Although Detective Ridler testified that the $600 check arrived in the "December bank statement" he apparently meant Lael's November bank statement that arrived in December. TR.798-99. Detective Ridler explained that after Lael's death, the police arranged for the post-office to hold Lael's bank statement. TR.799. The rest of Lael's mail was forwarded to Clara. TR.591-92 [42-43]. The forged $600 check, dated 1 November 1993, was in the statement police picked up from the post-office. TR.592

Police showed Petitioner one of the forgeries and its model by holding the two up to the light and noting how it appeared to be traced. TR.886-87. Petitioner claimed to have watched Lael write this check; in fact, she said that she saw Lael write all the checks. TR.797, 800-01. Petitioner's son Ryan Buttars testified that he watched Lael write out a forged check for $1000 in September 1993. TR.902. When asked on cross-examination whether he would stretch the truth "a little bit" for his mother, Buttars responded, "I don't know." TR.926. On redirect, he denied lying. TR.926.

When police suggested that the forgeries were a possible motive for the homicide, Petitioner conceded, "There's a perfect motive if I had a bunch of forged checks." TR.801-02.

Based on the foregoing evidence, the jury convicted Petitioner of aggravated murder. TR.159, 221, 257. The trial court sentenced her to life in prison with the possibility of parole. TR.317-18.

Direct Appeal

Petitioner appealed, arguing, among other things, that the evidence was insufficient to support her conviction. *See State v. Brown*, 948 P.2d 337, 343-46 (Utah 1997) (a copy is included in Addendum E). This court affirmed the conviction. *See id.* It held that the evidence supported the reasonable inferences that Petitioner had stolen from Lael and therefore had a motive to kill him; that because she had cleaned for Lael, she knew where he kept his financial papers and gun; that Lael's murderer likely had a

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[43], 798-99. Clara never received Lael's October or November bank statements. TR.591-92 [42-43].

key to his home; that Petitioner was the murderer because only she and Lael had keys; that Petitioner shot Lael with his gun while he slept at about 7 a.m. when she had no alibi and when the neighbor heard gunshots; and that she took the financial records and the gun that incriminated her. *See id.* at 346.

Post-Conviction and Factual Innocence Petition

Over eleven years later, in 2009, Petitioner filed a petition under the Post-Conviction Remedies Act (PCRA). PCR.1-9. The PCRA's general provisions allow a petitioner to obtain relief in the form of a new trial if her conviction was obtained in violation of her constitutional rights, including her right to the effective assistance of counsel, or if newly discovered evidence demonstrates that "no reasonable trier of fact could have found the petitioner guilty." *See* UTAH CODE ANN. §§ 78B-9-104(1)(a), (d), & (e); 78B-9-108(1)(b). The PCRA's factual innocence part allows a petitioner to obtain relief in the form of a complete exoneration if newly discovered evidence establishes by clear and convincing evidence that she did not "engage in the conduct for which [she] was convicted." *See id.* §§ 78B-9-401.5(2)(a); -402(2)(a); -404(4).

Petitioner alleged that she was entitled to relief under both parts because (1) newly discovered evidence established her factual innocence under the PCRA's factual innocence part; and (2) the same evidence, and alleged due process and ineffective assistance of counsel claims, entitled her to a new trial under the PCRA's general provisions. PCR.5-6. The petition was assigned to First District Judge Kevin Allen. PCR.1, 274-75.

The State filed two motions to dismiss: one focused on the factual innocence claim (PCR.278-97), the other on the general PCRA claims (PRC.298-343). Judge Allen denied both motions. PCR.460-70.

The State then moved for summary judgment on the general PCRA claims. PCR.973-1181, 1191-92. Before hearing the motion, Judge Allen recused himself and the case was transferred to the Second District and assigned to Judge Michael DiReda. PCR.1604, 1770; 2251:3-8.

Judge DiReda granted the State's summary judgment motion. PCR.1804-50. Petitioner filed a timely notice of appeal from that order. PCR.2018, 2083. Judge DiReda then held a four-day evidentiary hearing on the factual innocence claim. PCR.2058-70; 2255-58.

Four-Day Factual Innocence Hearing[7]

At the evidentiary hearing, Petitioner sought to undermine the evidence at her 1995 trial that only she had the motive, access, and opportunity to kill Lael. Petitioner argued that she could meet her burden of proving factual innocence merely by undermining "each element of the [State's] circumstantial case" against her and showing that "no reasonable juror could have found her guilty beyond a reasonable doubt." PCR.2258:52-53. However, the factual innocence part of the PCRA required Petitioner

[7] The factual innocence statute requires the court to examine a petitioner's evidence in light of "the record of the original criminal case." UTAH CODE ANN. § 78B-9-404(3). The State therefore recites all the evidence produced at the factual innocence hearing that both supports and undercuts Petitioner's claims.

to demonstrate by clear and convincing evidence that she "did not engage in the conduct for which [she] was convicted." UTAH CODE ANN. § 78B-9-401.5(2)(a).

Judge DiReda concluded that Petitioner had relied on "an incorrect legal standard" because the "no reasonable juror" standard is the standard for obtaining a new trial under the PCRA's general provisions. PCR.2104, 2115 (the post-conviction court's ruling is attached as Addendum D); UTAH CODE ANN. § 78B-9-104(1)(e)(iv). He concluded that "factual innocence is only established if Petitioner affirmatively demonstrates by clear and convincing evidence that she did not, in fact, commit the homicide." PCR.2105 (citing UTAH CODE ANN. § 78B-9-401.5(2)(a)). The court concluded that "raising doubt as to her underlying conviction, even strong doubt, is not the legal equivalent under the factual innocence statute of establishing that [Petitioner] did not, in fact, cause Lael Brown's death." PCR.2106.

Judge DiReda therefore discounted all of the evidence that Petitioner presented at the four-day factual innocence hearing because it did not even meet the incorrect standard that Petitioner had relied on. PCR.2115-19. The evidence did "not establish, either on its own or when viewed with all the other evidence, that no reasonable juror could have convicted Petitioner had this evidence been presented at the original trial." PCR.2117, 2119.

Petitioner's evidence about her motive. Petitioner sought to dispel the trial evidence that the forged checks gave her motive to kill Lael. Although she did not testify at trial, Petitioner testified at the factual innocence evidentiary hearing. PCR.2257:66-106. She now admitted that she forged Lael's checks from August to October 1993,

stealing approximately $3600, and that she lied about the forgeries during her 1995 prosecution. PCR.2257:74-75. She said she lied because she was scared and did not "walk with a lot of integrity back then." PCR.2257:77.

Petitioner claimed that the forgeries, however, did not give her motive to kill Lael because, contrary to the trial evidence, he likely had not discovered them and likely had not yet received the October 1993 bank statement. PCR.2258:54-58. In support, she offered copies of several postmarked envelopes showing when some of Lael's other 1993 bank statements had been mailed. PCR.Petitioner's Exhibit 1, Tab 9. The legible postmarks show that those envelopes were mailed on the 4th, 5th, 7th, or 8th of the month. PCR.Petitioner's Exhibit 1, Tab 9. Petitioner did not submit copies of envelopes showing when his September and October 1993 bank statements were mailed, likely because neither police nor Lael's family ever received those original statements. TR.591-92 [42-43]; PCR.Petitioner's Exhibit 2, Tab 59. Petitioner essentially argued, based on the dates that the other 1993 statements were mailed, that Lael would not have received the October statement before the murder. PCR.2258:55-56. However, Petitioner produced no evidence contradicting the trial testimony of bank and postal employees that the October statement would have arrived by at least Friday, 5 November 1993. TR.767-68, 773, 776.

Petitioner denied stealing Lael's bank statements, canceled checks, or other financial records. PCR.2257:75. She also denied that Lael ever confronted her about the forgeries or accused her of "cleaning out" his bank account. PCR.2257:76. But she called her trial attorney, Shannon Demler, who testified that, during preparations for the

1995 trial, the defense team learned that one of Lael's neighbors had overheard him arguing with a woman on the evening of Friday, 5 November 1993. PCR.2256:93-95. Demler had testified at his deposition that the neighbor identified Petitioner as the woman, but at the evidentiary hearing said that the neighbor had not actually seen who was arguing, but had only heard a female voice engaging in an argument in Lael's house or yard. PCR.2256:94-95. This evidence was never introduced at trial, because neither the prosecution nor police were privy to it. PCR.2256:93.

Petitioner also now claimed that the October bank statement was not the only one missing from Lael's house. PCR.2258:56-58. In support, she called one detective who testified generally from memory that "there were several bank statements that we could not locate," and that "[t]here were bank statements missing, specific checks missing, entire bank statements with checks and just some checks were missing." PCR.2256:39-40. Petitioner also presented evidence that Lael's house was "[p]retty filthy" and "in disarray," as were the financial papers on his dining room table. PCR.2255:147-48. But a police document prepared during the murder investigation identified only Lael's September and October statements as missing. PCR.Petitioner's Exhibit 2, Tab 59.

Petitioner also now claimed that notwithstanding the forgeries, she had no motive to kill Lael because she depended on him for money. PCR.2258:62. She testified that she associated with Lael socially and that they exchanged favors. PCR.2257:70-71. She cooked for Lael and helped him with his property maintenance; Lael paid her for both, repaired her vehicles, and loaned her money. PCR.2257:69-71. Petitioner saw Lael as her "go-to" when she needed anything. PCR.2257:71.

Finally, Petitioner speculated that one of Lael's former tenants, Bobbie Sheen, might have had a motive to kill Lael because Lael kept large amounts of cash in his home and Sheen was angry with Lael for evicting him. PCR.2257:41-43.

Access. Petitioner also tried to show that someone else, without a key, could have entered Lael's home. Petitioner contended that Lael's house was not as secure as the police had testified at trial. Although an officer testified at trial that the windows in Lael's home appeared to have been painted shut, another officer's report stated that he had opened Lael's bathroom window during the investigation. PCR.2255:139-40; 2256:8-9. Petitioner also argued based on crime scene photos that the windows were broken on a "shack-like addition" to Lael's house that enclosed the back door area, as was the glass or Plexiglas in Lael's front screen door. PCR.2255:143, 145. The police did not investigate whether that damage occurred before Lael's death. PCR.2255:144, 183-84. Additionally, referring to police reports and crime scene photos, Petitioner reemphasized trial evidence that there was no working lock on Lael's back door; rather, it was secured with duct tape and a knife wedged between the door and the jamb. PCR.2255:142, 145, 181-83; 2256:6-8. Petitioner also highlighted preliminary hearing testimony from Lael's son Mike, that Lael left the front door unlocked when he was home. TR.539; PCR.2258:62-63.

Finally, Petitioner testified that Lael's son Mike also had a key to Lael's house and she believed that Mike had lived there in early 1993. PCR.2257:74. But Mike testified at the evidentiary hearing that he returned the key when he moved out in March 1992 and that he did not have a key to Lael's home in November 1993. PCR.2261:37-38.

Bobby Sheen. Petitioner posited that Bobby Sheen was a possible suspect that police did not adequately investigate. PCR.2258:66-67. Lael evicted Sheen in August 1993. PCR.2257:94-95. Petitioner called Sylvan Bassett, a friend of Sheen's, who testified that Sheen was angry with Lael and wanted his money. PCR.2257:41-43. Bassett said that about three months after Lael's death, he saw Sheen with about $1500 in cash, even though Sheen had no income. PCR.2257:41-43. Bassett believed that Sheen was a talented professional burglar. PCR.2257:40. Although Basset testified that Sheen had shown him a Colt Woodsman .22, PCR.2257:43, his pre-hearing affidavit stated that Sheen had shown him only a "Browning .22 automatic." PCR.2257:56. Bassett said that Sheen later told him that he had turned the gun into "fish food" by dumping it in a local marina. PCR.2257:43.

Lael's neighbor Standridge testified at trial that on Saturday, 6 November she saw a "blue and white Blazer" pull into the driveway on the side of Lael's house and leave after less than five minutes. TR.601, 606-07. She explained, however, that Lael essentially shared the driveway with the adjacent house. TR.609. Bassett now testified that he believed that Sheen may have been driving a blue and white Ford Bronco or pickup at the time of the murder. PCR.2257:65. But in his pre-hearing affidavit, he had crossed through the word "Bronco" and written "F250 pickup," so that the statement read: "Bobbie drove a blue and white Ford F250 pickup at the time. PCR.Petitioner's Exhibit 1, Tab 16, p.1.

Bassett knew in his "heart" that Sheen had something to do with Lael's murder, and he claimed that when he tried to tell Clara Brown about his suspicions he was "rudely

run off," and later told by a Logan police officer that, if he "knew what was good for [him]," he would "let it go, leave it alone." PCR.2257:44-45.

Police had received tips during their investigation that Bobbie Sheen was a possible suspect in Lael's murder and that Sylvan Bassett had information relating to Sheen, but no evidence showed whether police did or did not investigate either Sheen or Bassett. PCR.2255:184-89; 2256:23-25, 34. When asked at the evidentiary hearing whether she ever told her trial counsel about Bobby Sheen, Petitioner responded, "I can't honestly say." PCR.2257:98. However, in her pre-hearing deposition, Petitioner said that she told her trial counsel that Sheen was a "possible suspect" because he was a "shady person" who had been behind on his rent and was eventually evicted. PCR.1824-25; Respondent's Exhibit 8 at 71-72, 95-96. In fact, after the trial, Petitioner's trial counsel investigated Bobby Sheen, but the information they had received "didn't pan out." PCR.2256:82. Sheen committed suicide in 2007. PCR.259, 2256:35, 187.

The Police Investigation. Petitioner also claimed that the police mishandled the crime scene and failed to collect critical evidence, including a bloody handprint on Lael's front door. PCR.2255:171-72, 223-24; 2258:68. Petitioner called an expert who testified that the police failed to follow standard practices for homicide investigations including disturbing potential evidence, not immediately securing the crime scene, not taking sufficient photographs, not recording a core temperature for Lael's body, removing evidence before the lead detective arrived, not adequately investigating other suspects, and not adequately documenting the investigation. PCR.2256:119-39.

As "additional illustrations of how police failed to properly investigate the case," Petitioner presented evidence that the police had received tips from two people who allegedly saw Lael on Saturday, 6 November: Delwin Hall and an unnamed secretary at Cache Valley Insurance. PCR.2120-21 n.14.; 2255:193-95; Petitioner's Exhibit 1, Tab 34, Exhibit 2, Tab 82. The lead detective could not recall whether he had followed up on either tip from seventeen years earlier. PCR.2255:193-95. These tip sheets were submitted along with hundreds of pages of other documents in two large exhibit binders. PCR.Petitioner's Exhibit 1, Tab 34, Exhibit 2, Tab 82.

Petitioner also pointed out that police had released Lael's home to his family two days after his body was discovered and had to rely on the family for evidence of Lael's financial documents. PCR.2255:176-80. And Petitioner noted that Lael's son Mike and Lael's grandson Todd were both suspects when police released the house. PCR.2255:178; 2256:32.

Petitioner also noted that she had taken and passed a polygraph in which she was asked whether she had killed Lael. PCR. 2257:93; Petitioner's Exhibit 2, Tab 70, pp.238-39.

Time of the Murder. Petitioner also challenged the State's trial theory that Lael was shot early Saturday morning. She called the medical examiner who reaffirmed his trial testimony that, although he had no way of "absolutely pinpointing a specific time of death," if only the physical evidence was considered, Lael likely died around 9:15 p.m. on Saturday, 6 November 1993, and no later than 3 a.m. on Sunday, 7 November.

PCR.2256:55, 69; TR.1475-76, 1486-89. But he testified that he was no closer now to fixing the time of Lael's death than he had been when he testified at trial. PCR.2256:69.

Paulette Nyman—the neighbor who testified seventeen years earlier at trial that she heard two gunshots shortly after 7 a.m. on Saturday—testified at the evidentiary hearing that she could not now remember whether she heard the shots on Saturday or Sunday morning. PCR.2256:195. She now believed that she heard the shots on the same day that she saw police activity at Lael's house, which would have been Sunday. PCR.2256:195-96. But, in February 1995, months before trial, Nyman told a defense investigator that she heard the shots on Sunday morning. PCR.2257:12; Petitioner's Exhibit 2, Tab 100. Nyman acknowledged making this statement when she testified at trial. TR.590-92. One officer testified at the evidentiary hearing that his "vague recollection" seventeen years later was that Nyman also said she heard the shots on Saturday night. PCR.2255:146-47.

Petitioner also presented police tip sheets in which people near Lael's home reported hearing gunshots at times other than around 7 a.m. on Saturday, November 6th. Petitioner's Exhibit 1, Tabs 44, 45, 46.

Petitioner's Whereabouts. At the evidentiary hearing, Petitioner testified that on Friday afternoon she worked with Lael, who "didn't feel very good," and looked like he was coming down with something. PCR.2257:77-79. She spent Friday night with her boyfriend, Brent Skabelund. PCR.2257:80.[8] On Saturday morning, she left Skabelund's

[8] Skabelund's name is misspelled in the post-conviction record as "Brett Stablen."

home around 6 or 7 a.m., went home, bathed, and then went to the store to buy ingredients to make soup for Lael and her daughter, who was also sick. PCR.2257:81-82. She testified that her son Ryan Buttars saw her sometime that morning. PCR.2257:82. Ryan testified at trial that he could not remember when he awoke Saturday morning, but "it was kind of late" and his mother was there when he awoke. TR.905.

Consistent with the trial evidence, Petitioner said that Clara Brown called her around 9:55 a.m. on Saturday morning after she could not reach Lael by telephone. PCR.2257:123-25. They talked for about twenty-seven minutes. PCR.2257:124. Clara asked Petitioner to check on Lael and call her back if he was sick. PCR.2257:124. Skabelund arrived at Petitioner's home while she was talking to Clara. PCR.2257:83, 124. TR.629.[9]

Petitioner testified that she and Skabelund left around 10:40 or 10:45 a.m. to attend her son's basketball game. TR.630; PCR.2257:83. Petitioner and Skabelund testified that they stayed for the whole game. TR.633; PCR.2257:83. Petitioner did not say when the game ended, but Skabelund testified at trial that they left the game at 12:15 p.m. PCR.2257:83; TR.633. This testimony was contrary to both neighbor Standridge's trial testimony that she saw Petitioner at Lael's house around noon, and Lael's granddaughter's preliminary hearing testimony that she saw Petitioner's truck at Lael's house between 11:15 and 11:45 a.m. TR.598-600 [89-91], 1687-92.

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[9] The post-conviction record sometimes refers to Lael's ex-wife Clara as "Claire." *See e.g.*, PCR.2256:13, 22.

Petitioner said that after the game, she and Skabelund had lunch at a drive-in and Skabelund took her home where she slept for a while. PCR.2257:84. She said she delivered the soup to Lael, and possibly her daughter, between 2 and 3 p.m. PCR.2257:84-86; TR.835, 1326.

Petitioner claimed that although Lael's truck was there, he did not answer when she knocked. PCR.2257:85. Petitioner said she wrote Lael a note which she left with the soup on his porch. PCR.2257:85. She said she did not use her key to take the soup in because she thought that Lael might be sleeping. PCR.2257:85-86. She said she also wanted to avoid talking with Lael because he could talk for a long time. PCR.2257:85-86. She did not check on Lael, even though she had told Clara that she would. PCR.2257:125-26. Rather, Petitioner returned home. PCR.2257:86.

Around 4:30 p.m., Petitioner and Skabelund went grocery shopping, then had dinner at Petitioner's, and later watched a movie at Skabelund's. TR.634; PCR.2257:86-87. Petitioner testified that she left Skabelund's around 10 or 11 p.m. and went back to her house where she slept. PCR.2257:87-88. She believed that her sons were still awake when she arrived home. PCR.2257:87-88.

At trial, Skabelund testified that Petitioner left his home around midnight Saturday night. TR.637. Petitioner's son Ryan testified at trial that Petitioner returned home "[a]fter midnight" on Sunday, November 7. TR.913, 920, 921.

Petitioner testified that on Sunday she went to Angie's around 8 a.m. to meet Lael for coffee. PCR.2257:88. According to Petitioner, Lael had a "ritual" of having morning coffee at Angie's. PCR.2257:88, 116. Petitioner said that when she did not see Lael's

truck at Angie's, she drove to his home. PCR.2257:89. Lael's truck was in his driveway and the soup was still on the porch in the "identical" spot Petitioner had left it. PCR.2257:89.

Petitioner knocked on Lael's door but got no answer. PCR.2257:89-90. She retrieved the key to Lael's home from the glove box of her truck and entered his home. PCR.2257:89-90. She discovered Lael's body, called 911, and then sat on Lael's porch. PCR.2257:90.

After paramedics and police arrived, Petitioner went next door to the neighbor's home where police interviewed her. PCR.2257:91-92. Skabelund then arrived and took petitioner home where police interviewed her again. PCR.2257:92-93. Police searched Petitioner's purse and truck, but found no incriminating evidence. PCR.2255:135-36.

Petitioner testified that she did not murder Lael Brown and that she did not know who did. PCR.2257:102.

Judge DiReda Ruled that the Evidence from the Four-day Hearing did not Prove Petitioner's Factual Innocence. As stated, Judge DiReda ruled that Petitioner had failed to prove her factual innocence, because the evidence from the four-day evidentiary hearing did not even satisfy the general PCRA's "no reasonable juror" standard that she had erroneously relied on. PCR.2115-19. Because a reasonable juror hearing Petitioner's evidence could still find her guilty, the court concluded that she necessarily had not demonstrated by clear and convincing evidence that she did not kill Lael Brown. PCR.2115-19.

The Court Reopens the Hearing. Two days after the evidentiary hearing concluded, the judge convened a telephone conference because he did not understand how two exhibits supported Petitioner's claim. PCR.2120-21 & n.14; 2259:1-4. The exhibits were the police tip sheets from Delwin Hall and an unnamed secretary at Cache Valley Insurance stating that they had seen Lael alive on Saturday, 6 November. PCR.2120. During the factual innocence hearing, Petitioner had used the exhibits merely as "additional illustrations of how the police failed to properly investigate the case." PCR.2120-21 n.14.

The trial court, however, thought the exhibits were "critical in this case" and asked Petitioner's counsel if they wanted to "reopen" to provide additional evidence to assist the court in evaluating the exhibits. PCR.2259:4. After additional investigation, the court granted Petitioner's counsel's request to reopen the hearing. PCR.2260:4. The State did not object. PCR.2260:4-5.

Evidence at the Reopened Hearing

Delwin Hall. Petitioner called Delwin Hall to testify about his tip to police. Hall knew Lael; they both drank coffee at Angie's. PCR.2261:3. A few days after the murder, Hall told police that he "thought" he had seen Lael having coffee at Angie's on Saturday. PCR.2261:4. Hall gave the statement to his neighbor, Detective Ridler, who wrote it down. PCR.2261:4, 6-7, 8-9; Petitioner's Exhibit 2, Tab 82. That statement, dated 10 November 1993, reads:

> Del is a friend/coffee drinking buddy of Lael's from Angie's. Dell related that he saw Lael Friday night at Angie's and also Saturday, 11-6-93 at approx. 1430 hours in Angie[']s. Dell is sure of the time, because he was stopping in Angie's before going to work at Albertsons at 1500 hours.

Petitioner's Exhibit 2, Tab 82. Hall did not know and had never spoken to Petitioner. PCR.2261:4.

By the time of the evidentiary hearing, seventeen years later, Hall admitted that he could not remember for sure what time he saw Lael on Saturday. PCR.2264:5, 7. But his memory at the evidentiary hearing was that it was around 1 p.m., rather than the 2:30 p.m. time he was "sure of" in 1995. PCR.2261:5, 7. Hall recalled that Lael was sitting at the counter with another man. PCR.2261:5. Hall did not greet Lael, because Lael and the other man were talking and Hall did not want to interrupt. PCR.2261:7-8. Lael and the other man left before Hall. PCR.2261:8. Hall could not remember how long after Saturday he had learned of Lael's death, but estimated that it was three or four days later. PCR.2261:4-5.

Hall could not remember talking to Detective Ridler. PCR.2261:8. But he did remember talking to John Caine, Petitioner's lead trial counsel. PCR.2261:9, 16. The two met at Angie's for about fifteen minutes. PCR.2261:9. Although Caine listed Hall on the defense witness list for Petitioner's trial and subpoenaed him to testify, Caine did not call him as a witness. PCR.2256:88; 2261:10 Respondent's Exhibit 7. Caine died before this action was filed. PCR.70 n.30.

On cross-examination, Hall admitted that he could not "remember that far back" and therefore could not now say "for sure" when he saw Lael. PCR.2261:16. Rather, he

explained that the best he could do at the evidentiary hearing was to "tell you exactly what I told them." PCR.2261:16. He testified, "at the time I was quite sure that it was on a Saturday that I saw him." PCR.2261:16.

Terry Carlsen. Petitioner also called her friend Terry Carlsen to testify at the reopened hearing. Carlsen said that he knew both Lael and his son Mike. PCR.2261:19. Carlsen believed he and Lael were "good friends." PCR.2261:21. Carlsen testified that on that Saturday he saw Lael and Mike Brown at Angie's around 7:15 p.m. PCR.2261:21-22. According to Carlsen, Lael and Mike stayed for a half hour and left around 7:45 p.m. PCR.2261:22-23. Carlsen said he learned of Lael's death on Sunday and was surprised to think that he had just seen Lael the night before. PCR.2261:24. Carlsen was "certain" that he saw Lael on that Saturday. PCR.2261:24.

Carlsen was previously convicted for tampering with a witness in an unrelated case. PCR.2261:25. He was good friends with Petitioner and she had called him a "few times" after she was arrested. PCR.2261:26. Carlsen maintained regular contact with Petitioner's aunt after Petitioner's arrest. PCR.2261:26.

Carlsen never reported to police that he had seen Lael that Saturday evening. PCR.2261:27. Rather, he said he told Petitioner's aunt and asked her to tell Petitioner's lawyers. PCR.2261:27. According to Carlsen, Petitioner's aunt told him that she had done so. PCR.2261:29. Carlsen first talked to Petitioner's post-conviction attorneys in 2008. PCR.2261:26.

Michael Brown. Michael Brown testified that he was not with his father at any time on Saturday. PCR.2261:39-40, 46. He initially testified at the reopened hearing that

he last saw his father alive on Monday, 1 November. PCR.2261:39. However, he had testified at Petitioner's preliminary hearing that he had coffee with his father at Angie's on the night of Thursday, 4 November. PCR.2261:41; TR.538. When confronted with this discrepancy, Mike explained that he did not remember testifying that way and that he had had memory problems during 1993-1994 from alcoholism. PCR.2261:41-42. He then clarified that the last time he saw his father alive was, at the very latest, Wednesday of the week that Lael was murdered. PCR.2261:45.

Waitresses. Several waitresses from Angie's had given statements to police on 9 November 1993, two days after Lael's body was found.[10] PCR.Petitioner's Exhibit 2, Tab 70 pp.101-07, 110-11. With one possible exception, none saw Lael at Angie's on Saturday, 6 November. *Id.* That exception, Holly Crockett, worked from 3 to 11 p.m. and reported that she thought she saw Lael on Saturday night, but was "very unsure" and thought it "[c]ould have been Friday night." *Id.* at p.101. Crockett's recollection was that Lael was "always in there." *Id.*

Debbie Keller worked the same shift that Saturday. *Id.* at p.102. She reported that Lael was always there about 8 p.m. but she did not see him that Saturday night. *Id.* She was unsure whether she last saw Lael on Thursday or Friday night. *Id.* Keller also reported that Lael "is always in there." *Id.*

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[10] No waitress testified during the factual innocence hearing or at trial. Rather, the parties relied on the waitress's police statements included in Petitioner's Exhibit 2 and admitted at the hearing. PCR.2255:96-99. These statements became more relevant after Hall's testimony at the reopened hearing, so the State summarizes them here.

Cindy Smith worked that Saturday from 7 a.m. to 3 p.m., but her statement also includes the notation "8 to 10:00" with no other explanation. *Id.* at p.103. Smith's statement does not say whether she saw Lael. *Id.*

Sally Peterson worked that Saturday from 6 a.m. to 2 p.m. *Id.* at p.104. She reported that Lael "is in there like clock work," but she did not think he was there that Saturday morning. *Id.*

Jenny Kemp worked that Saturday morning from 5:30 a.m. to 2 p.m. *Id.* at p.105. She last saw Lael on Friday and could not remember seeing him on Saturday. *Id.*

Kim Churchill worked that Saturday from 10 a.m. to 3 p.m. *Id.* at p.106. She reported that she did not see Lael Saturday morning. *Id.*

Lori Craig worked in the dining room that Saturday from 8 a.m. to 3 p.m. *Id.* at 107. She reported that Lael came in "4 to 8 times a day" but she did not think he was in that Saturday morning. *Id.*

Bonnie Kaae worked that Saturday from 6 p.m. to 11 p.m. *Id.* at p.110. She did not see Lael. *Id.*

The Post-Conviction Court's Ruling

The post-conviction court concluded that the evidence presented in the reopened hearing demonstrated that Petitioner did not kill Lael. PCR.2135-39. Based primarily on Delwin Hall's testimony, the court found that Petitioner had established two key facts "by clear and convincing evidence": (1) "that Lael Brown was alive Saturday afternoon on November 6, 1993," and (2) "that Petitioner's whereabouts from Saturday afternoon on

November 6th to the early morning hours of Sunday, November 7th, have been firmly established." PCR.2135, 2139.

Because much of Petitioner's evidence, including Hall's testimony, was not newly discovered, the court recognized that it first had to determine whether the statute required its determination to be based newly discovered evidence. PCR.2106-15. The court initially recognized that section 78B-9-402(2)(a) requires a petitioner to specifically identify newly discovered evidence that establishes her factual innocence. PCR.2106-07. But, as explained below, the court ultimately reasoned that it could "base its determination of factual innocence either upon newly discovered evidence alone or a combination of evidence—as long as the newly discovered material evidence provides at least part of that basis." PCR.2115.

Hall's testimony. The court's ruling hinged on Hall's testimony. PCR.2135-36. The court declared that "[t]he significance of the evidence provided by Hall cannot be overstated," because his testimony provided "direct evidence that Lael was alive Saturday afternoon," in contrast to the "circumstantial evidence" at trial that Lael was killed Saturday morning. PCR.2136. But the court properly found that Hall's testimony "[did] not constitute newly discovered material evidence as defined by the factual innocence statute." PCR.2130. Hall's testimony could not be newly discovered, because Hall met with defense counsel before trial and was included on the defense witness list for trial. PCR.2261:9-10; 2267 (Respondent's Exhibit7).

The court found that Hall was credible and "not mistaken when he stated that he saw Lael at Angie's Restaurant during the early afternoon hours on Saturday, November

6th." PCR.2133. The court noted that Hall gave his statement to Detective Ridler less than four days after Hall saw Lael at Angie's, and "there were no intervening weekends to cause confusion." PCR.2130-31. The court also found it significant that Hall told Detective Ridler that he saw Lael on "Friday *night* as well as Saturday *afternoon*." PCR.2131 (emphasis in original). The court noted that Hall had "a high degree of certainty" about his testimony and no evidence suggested that Hall was easily confused about dates or had short-term memory problems. PCR.2131.

While the court gave significant weight to Hall's testimony, it discounted the seven waitress statements to police that none saw Lael at Angie's on Saturday. PCR.2131. The court stressed that some of the waitresses (Crockett and Keller) did not begin their shifts until after Hall said Lael had left Angie's, and those who were working between 1 p.m. and 2:30 p.m. (Peterson, Churchill, and Craig) said only that they did not see Lael on "Saturday *morning*." PCR.2131-33 (emphasis in original).

Although Cindy Smith may have also worked during that relevant time, her statement did not say whether she saw Lael during her shift. PCR.2132. Finally, Jenny Kemp worked from 5:30 a.m. until 2:00 p.m. and stated that she could not remember seeing Lael on Saturday. PCR.Petitioner's Exhibit 2, Tab 70, p.105. But the court reasoned that not remembering "seeing Lael at Angie's on Saturday is not the same as saying that Lael was not there on Saturday." PCR.2132. The court further reasoned that if Hall saw Lael at 2:30 p.m., as he told police, rather than at 1:00 p.m., as he now testified, then Kemp's statement would not be inconsistent with Hall's testimony. The court concluded that Hall's inconsistent recollection of the time of day that he saw Lael

was "not a material inconsistency." PCR.2134. The court also found that the inconsistency was "evidence of Hall's truthfulness," because he could have refrained from saying anything inconsistent. PCR.2134.

The court also viewed Hall's testimony as "consistent with, and in fact bolstered by," the medical examiner's testimony that, considering only the physical evidence, Lael likely died around 9 p.m. Saturday night. PCR.2133. The court believed that neighbor Standridge's testimony that she did not hear any gunshots while she was in her yard that Saturday also provided "at least some evidence that supports a finding that Lael was alive Saturday afternoon." PCR.2135.

In a footnote, the court discounted the trial evidence suggesting that Lael was dead by Saturday morning. PCR.2133 n.17. It reasoned that "other plausible explanations ... could also easily account for these facts." PCR.2133 n.17. For example, the court posited that Lael may not have kept his morning coffee ritual, answered his ex-wife's and granddaughter's telephone calls, worked in his yard, driven his truck, kept his promised appointment to complete the plumbing repairs, or picked up Petitioner's soup from his porch, because he "was simply not feeling well." PCR.21333 n.17.

Petitioner's whereabouts. The post-conviction court then found that Petitioner had "firmly established" and "adequately accounted for her whereabouts between 1:00 p.m. on Saturday and 3:00 a.m. on Sunday," the time the court now believed, based on Hall's testimony, that Lael must have been murdered. PCR.2137, 2139. Although Petitioner's whereabouts on Saturday afternoon was never really at issue in Petitioner's criminal trial, the post-conviction court relied on statements from this Court's direct

appeal opinion that Petitioner "'could account for her whereabouts *for the entire weekend* except for'" early Saturday morning, and that, other than early Saturday morning, "'*[t]he defense established the whereabouts of [Petitioner] for the remaining period when the murder could have occurred.*'" PCR.2137 (quoting *State v. Brown*, 948 P.2d 337, 340, 345 (Utah 1997)) (emphasis by post-conviction court).

The court also relied on its "independent assessment" of the evidence. PCR.2138. The court believed that "no evidence was presented to suggest that [Petitioner's] account of [her] whereabouts is inaccurate." PCR.2139. The court further noted that although Petitioner may have been alone at times, "no evidence has ever been presented establishing that Lael was killed during the time period she was by herself." PCR.2138 n.19.

The court acknowledged that Petitioner's evidentiary hearing testimony must be "viewed with some skepticism." PCR.2138 n.18. It nevertheless found her to be credible in light of her demeanor, the internal consistency of her testimony, and the fact that, in the court's view, her "version of events has basically remained unchanged since 1993 and is materially consistent with facts provided by third parties." PCR.2138 n.18. The court believed that Petitioner's belated admissions that she lied about her forgeries and stealing from Lael only enhanced her credibility. PCR.2138 n.18.

Other evidence. The court relied to a lesser extent on evidentiary hearing testimony from Nyman and Carlsen. PCR.2135-36. The court viewed Nyman's evidentiary hearing testimony that she now believed she heard gunshots on Sunday not Saturday as new evidence because it contradicted her trial testimony. PCR.2118-19.

However, the court concluded that this testimony was unhelpful and therefore gave it "relatively little weight." PCR.2119, 2135. Because the latest that Lael could have died was 3 a.m. on Sunday morning, it was "simply not possible that if Nyman heard gunshots at 7:00 a.m. on Sunday[,] that those gunshots were in any way connected to Lael's murder." PCR.2119. Thus, the most that Nyman's testimony showed is that she is now "unclear whether she heard gunshots at 7:00 a.m. on Saturday, November 6th." PCR.2119.

The court also discounted Carlsen's testimony that he saw Lael and his son at Angie's at 7:15 p.m. on Saturday night, because it found that Carlsen lacked credibility. PCR.2129, 2136. Nevertheless, the court gave Carlsen's testimony "*some* weight." PCR.2136 (emphasis in original).

Based on the above, the court determined that Petitioner had established her factual innocence. PCR.2139.

SUMMARY OF ARGUMENT

I. In determining that Petitioner had demonstrated her factual innocence, the post-conviction court reasoned that newly discovered evidence had to provide only "part of [the] basis" for that determination. PCR.2115. In other words, as long as the court included some newly discovered evidence in its reasoning, then the court could rely on any evidence, even previously known and available evidence, as the pivotal evidence that transforms the entire evidentiary picture and establishes the petitioner's innocence.

However, the factual innocence statutes require that newly discovered evidence be the pivotal transformative evidence. Section 78B-9-402 requires a petitioner to

specifically identify the newly discovered evidence that establishes her factual innocence and then show how this new evidence, when viewed with all the other evidence, establishes and demonstrates her factual innocence.

The court's determination hinged on the Delwin Hall's testimony. But the court found that his testimony was not newly discovered because the defense team had met with Hall before trial and then did not call him to testify. Because the court misinterpreted the statute, it erroneously relied on this previously available testimony as the pivotal evidence that, in its view, established Petitioner's factual innocence.

II. As a threshold matter, the court correctly ruled that Petitioner relied on the wrong legal standard and that her evidence from the first four days of the hearing did not establish her factual innocence. Petitioner erroneously believed that she had to show only that no reasonable trier of fact could have found her guilty. But that is the standard for obtaining a new trial based on newly discovered evidence under the PCRA's general provisions. To prove her factual innocence, Petitioner had to do more. She had to show that she did not murder Lael.

The court correctly concluded that Petitioner's evidence from the first four days of the hearing did not even show that no reasonable trier of fact could have found her guilty. Where Petitioner's evidence did not preclude a reasonable juror from finding her guilty, it necessarily did not clearly and convincingly establish that she did not kill Lael.

But the court erred in concluding that Petitioner's evidence at the reopened hearing established her factual innocence. Hall's testimony was no more persuasive than Petitioner's original evidence. Substantial evidence contradicted both Hall's testimony

and Petitioner's account of her whereabouts. Therefore, a reasonable juror hearing all of the evidence could still find Petitioner guilty. Because Petitioner's evidence did not even prevent a reasonable juror from still finding her guilty, that evidence necessarily failed to clearly and convincingly demonstrate Petitioner's factual innocence.

ARGUMENT

I. THE COURT ERRONEOUSLY CONCLUDED THAT PREVIOUSLY AVAILABLE EVIDENCE COULD ESTABLISH PETITIONER'S FACTUAL INNOCENCE

As explained, in ruling that Petitioner had proved her factual innocence, the post-conviction court concluded that previously known and available evidence could be the pivotal, transformative evidence that demonstrated factual innocence, as long as some newly discovered evidence also "provide[ed] at least part of [the] basis" for the determination. PCR.2115, 2135-39. That conclusion contradicts the plain language of section 78B-9-402(2)(a), which requires a petitioner to specifically identify the newly discovered evidence that "establishes" her factual innocence and then show how this new evidence, when viewed with all the other evidence, "demonstrates" her factual innocence. Here, the only newly discovered evidence that the court relied on was Terry Carlsen's testimony, which the court found not credible. PCR.2135-36.

A. The factual innocence statutes require that newly discovered evidence establish factual innocence.

This Court's "primary objective in interpreting a statute is to give effect to the intent of the legislature." *State ex rel. J.M.S.*, 2011 UT 75, ¶ 13, 697 Utah Adv. Rep. 60. "To do so," this Court will "'look first to [the statute's] plain language and presume that

the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.'" *Id.* (quoting *Boyle v. Christensen*, 2011 UT 20, ¶ 27, 251 P.3d 810 (internal quotation marks omitted)). Proper "'interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole.'" *Id.* (quoting *Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147 (internal quotation marks omitted)).

When properly read, the PCRA's factual innocence part requires that newly discovered evidence establish factual innocence, not merely play some part in the determination. Both the plain language of the statutes and the PCRA's structure demonstrate this.

The plain language of section 78B-9-402(2)(a) refers repeatedly to newly discovered evidence. *See* UTAH CODE ANN. § 78B-9-402(2)(a).[11] That section requires a petitioner who seeks a determination of factual innocence to allege that "newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent." *Id.* § 78B-9-402(2)(a)(i). The petitioner must also allege that it is this "specific evidence" that "establishes innocence." *Id.* § 78B-9-402(2)(a)(ii). The petitioner must further allege that, when "viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent." *Id.* § 78B-9-

[11] Although Petitioner filed her petition in March 2009, the parties and the post-conviction court all relied on the 2010 version of the factual innocence statutes in arguing and deciding this case. PCR.1, 2102-15; 2255:1-17; 2258:1-16. The 2010 amendments did not materially alter the relevant language. Therefore, this brief also relies on the 2010 version.

402(2)(a)(v). A factual innocence petition must therefore allege that there is "newly discovered material evidence" that "*establishes* that the petitioner is factually innocent"; that "the specific evidence identified ... in the petition "*establishes* innocence"; and that when "viewed with all the other evidence, the *newly discovered evidence demonstrates* that the petitioner is factually innocent." *Id.* § 78B-9-402(2)(a)(i) (ii) & (v) (emphasis added).

This plain, unambiguous language makes clear that newly discovered evidence must be the pivotal transformative evidence that forms the basis of a factual innocence determination. Indeed, the post-conviction court recognized, at least initially, that section 78B-9-402 "outlines the requirements a petitioner must satisfy in order to have the petition granted by the reviewing court." PCR.2107.

The statute defines "'[n]ewly discovered material evidence'" as "evidence that was not available to the petitioner at trial or during the resolution on the merits by the trial court or any motion to withdraw a guilty plea or motion for new trial and which is relevant to the determination of the issue of factual innocence." *Id.* § 78B-9-401.5(3). But the evidence may not be "merely cumulative of evidence that was known," or "merely impeachment evidence." *Id.* § 78B-9-402(2)(a)(iii)-(iv).

Other provisions in the factual innocence part confirm the newly discovered evidence requirement. At a hearing on a petition for factual innocence, the court "may consider: (a) evidence that was suppressed, or would be suppressed at a criminal trial; and (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility." *Id.* § 78B-9-404(2). Also, the court "shall consider, in addition

to the evidence presented at the hearing under this part, the record of the original criminal case and at any postconviction proceedings in the case." *Id.* § 78B-9-404(3). But while a court may consider this previously available evidence, a petitioner may not "merely relitigate facts, issues, or evidence presented in a previous proceeding." *Id.* § 78B-9-402(9)(c).

The PCRA's structure further reinforces the newly discovered evidence requirement. The PCRA's factual innocence part provides an extraordinary remedy for an extraordinary circumstance. Unlike the PCRA's general provisions, the factual innocence part has no limitations period or procedural bars. Under the general PCRA provisions, a petitioner is entitled at most to a new trial. *See id.* § 78B-9-108. But if a court finds a petitioner to be factually innocent, it must vacate the petitioner's conviction with prejudice, order it expunged, and provide monetary compensation for any time served on the wrongful conviction. *Id.* §§ 78B-9-404(4)(a), -405(1)(a). The Legislature reserved this extraordinary remedy for the extraordinary circumstance when new evidence demonstrates that a truly innocent person was convicted. The Legislature did not intend that this remedy apply to circumstances where a petitioner was merely relitigating evidence that was or could have been presented at trial.

As the post-conviction court correctly recognized, important policy reasons justify the newly discovered evidence requirement. PCR.2111-13. If a factual innocence determination could be based on previously presented evidence, a post-conviction court could improperly substitute its judgment for the jury's. PCR.2112. Such a determination would also contradict "the pleading requirements found in section 78B-9-402(9)(c),

which precludes petitions that 'merely relitigate[e] facts, issues or evidence presented in a previous proceeding.'" PCR.2111-12 (quoting § 78B-9-402(9)(c)).

Additionally, if a determination could be based solely on evidence available at trial but not presented for tactical reasons or ineffective assistance of counsel, that would encroach on the general PCRA provisions. PCR.2112. Under those provisions, a petitioner may seek relief based on a claim of ineffective assistance, but unlike a factual innocence claim, an ineffective assistance claim is subject to time and procedural bars. PCR.2112; *see* UTAH CODE ANN. §§ 78B-9-104(1)(d), -106 & -107.

Moreover, to obtain a determination of factual innocence, a petitioner's newly discovered evidence must do more than merely demonstrate that "no reasonable trier of fact could have found the petitioner guilty"—the general PCRA's standard for obtaining a new trial based on newly discovered evidence. *See* UTAH CODE ANN. § 78B-9-104(1)(e)(iv). Rather, under the PCRA's factual innocence part, the new evidence must so change the evidentiary picture that it convinces the court that the petitioner "did not … engage in the conduct for which [she] was convicted." *See id.* § 78B-9-401.5(2).

B. The post-conviction court erroneously concluded that section 78B-9-404 overrode the pleading requirements of section 78B-9-402.

The post-conviction court misinterpreted the factual innocence statutory scheme by concluding that newly discovered evidence need not be the pivotal transformative evidence that "establishes" or "demonstrates" factual innocence, but need only form "part" of the basis for a factual innocence determination. PCR.2115. As stated, the court properly recognized that the pleading requirements of section 78B-9-402 "outline[] the

requirements a petitioner must satisfy in order to have the petition granted by the reviewing court." PCR.2107. But the court reasoned that section 78B-9-404—which addresses what evidence is admissible at a factual innocence hearing—overrode those requirements by allowing the court to consider more than just newly discovered evidence at the evidentiary hearing. PCR.2109-15. Ultimately, the court concluded that the "non-restrictive, plain language of section 78B-9-404 suggests that a finding of factual innocence need not be based upon newly discovered evidence," but may instead be based on "a broad consideration of any evidence." PCR.2111. As explained, the court ultimately concluded that it could "base its determination of factual innocence either upon newly discovered evidence alone or a combination of evidence—as long as the newly discovered material evidence provides at least part of that basis." PCR.2115.

The post-conviction court misinterpreted the factual innocence statutory scheme. As explained, the plain language of section 78B-9-402(2)(a) requires newly discovered evidence be the evidence that "establishes" or "demonstrates" factual innocence. PCR.2115.

The fact that section 78B-9-404 "places no restrictions on the type of evidence the parties may present" at the evidentiary hearing does not override the requirement that newly discovered evidence be the pivotal evidence that establishes and demonstrates factual innocence. PCR.2109. Section 78B-9-404 allows all relevant evidence to be presented at a hearing so that the court may fully and accurately evaluate the impact of petitioner's newly discovered evidence on the evidentiary picture presented at trial. But that section makes no comment, either explicitly or implicitly, on the ultimate evidentiary

basis for determining factual innocence. Rather, that basis is found in the pleading requirements of section 78B-9-402(2)(a), because those requirements establish the elements of a claim of factual innocence.

The type of evidence admissible at a hearing does not establish the elements of the claim being tried. Rather, those elements are determined either by statute or the common law. *See Gohler v. Wood*, 919 P.2d 561, 562-65 (Utah 1996) (statute defined elements of state private right of action for securities fraud, while common law defined elements of federal implied right of action). The evidentiary rules provide that, unless otherwise prohibited by law or rule, "[a]ll relevant evidence is admissible" at every trial or evidentiary hearing. *See* Utah R. Evid. 402. But this does not change the elements of the claim at issue. Thus, the post-conviction court erroneously looked to the type of admissible evidence, instead of to the requirements in section 78B-9-402, to determine the elements of a factual innocence claim.

The post-conviction court's reasoning reveals the flaw in its conclusion. Basing a factual innocence determination on evidence that is not newly discovered undermines the plain statutory language and supportive policy that the court itself recognized. PCR.2111-13. As the court noted, basing a factual innocence determination on previously known and available evidence contradicts the plain language of 78B-9-402(2)(a) and allows a post-conviction court to improperly substitute its view of the evidence for the jury's and to encroach on the PCRA's general provisions. PCR.2111-13.

C. The court erroneously based its factual innocence determination on previously known and available evidence.

Here, the post-conviction court's determination is erroneous because the only newly discovered evidence it relied on was Terry Carlsen's testimony, which it found not credible. PCR.2135-36. As explained, the court's factual innocence determination hinged on Hall's testimony. PCR.2135-36. But the court correctly found that Hall's testimony was not newly discovered, because Petitioner's trial counsel knew about him, subpoenaed him to testify, but did not call him at trial. PCR.2261:9-10.

The court also relied somewhat on evidentiary hearing testimony from Petitioner, Nyman, and the medical examiner, and on neighbor Standridge's trial testimony. PCR.2135-36. However, none of that testimony was newly discovered evidence.

First, the court improperly relied on Petitioner's testimony. Such testimony can never be newly discovered evidence because it is always available to the petitioner at trial. Petitioner could have testified at her trial, but strategically chose not to. The Legislature could not have intended that a petitioner could establish her factual innocence by merely testifying that she is innocent. Relying on Petitioner's testimony to demonstrate factual innocence therefore contradicts both the requirement that newly discovered evidence establish factual innocence, and the policy behind that requirement.

Second, the court erroneously classified Nyman's evidentiary hearing testimony as "newly discovered" on the ground that it contradicted her trial testimony that she heard the gunshots on Saturday, not Sunday. PCR.2118-19. But Nyman acknowledged at trial having told a defense investigator that she thought she heard the shots on Sunday rather

than Saturday. TR.590-92; PCR.1822-23. Indeed, in granting the State's summary judgment motion the post-conviction court concluded that Nyman's now inconsistent testimony was not newly discovered. PCR.1822-23.

The court also relied on the medical examiner's evidentiary hearing testimony that the most likely time of death as indicated solely by the physical evidence was 9 p.m. on Saturday. PCR.2136. But that testimony was not newly discovered, because it merely repeated the medical examiner's trial testimony. TR.1475-76, 1486-89. And the court did not take into account the medical examiner's testimony that he could not pinpoint the time of death with certainty. The court also relied on trial testimony from neighbor Standridge that she heard no gunshots while working outside Saturday. PCR.2135. Therefore, none of this testimony was newly discovered. *See* UTAH CODE ANN. § 78B-9-401.5(3) (defining newly discovered evidence as evidence "that was not available to the petitioner at trial").

Thus, the only newly discovered evidence that supported the court's determination was Carlsen's testimony that he saw Lael and his son having dinner at Angie's at 7:15 p.m. on that Saturday night. The court found Carlsen's testimony to be newly discovered because there was no evidence that police ever spoke to him or that he ever spoke to Petitioner or her counsel about his information. PCR.2123. But the court also found him not credible and discounted his testimony for good reasons: Carlsen was Petitioner's friend, he failed to come forward earlier, and he had been convicted of witness tampering. PCR.2135-36.

Thus, the court's determination relied minimally on Carlsen's incredible testimony and hinged entirely on Hall's previously known and available testimony. PCR.2135-36. Therefore, the court's factual innocence determination is erroneous because it is based on previously available, rather than newly discovered evidence, as providing the pivotal transformative evidence. *See* UTAH CODE ANN. § 78B-9-402(2)(a).

II. PETITIONER DID NOT DEMONSTRATE HER FACTUAL INNOCENCE BY CLEAR AND CONVINCING EVIDENCE

As stated, the post-conviction court correctly understood (1) the legal standard that Petitioner had to satisfy to obtain relief and (2) that Petitioner's evidence from the first four days of the hearing did not satisfy that standard. PCR.2102-06, 2115-19. The court erred, however, in finding that Petitioner's evidence at the reopened hearing sufficed. PCR.2129-39. That evidence was no more persuasive than her original evidence because it did not preclude a reasonable juror from finding her guilty. A reasonable juror who heard Hall's testimony could still find Petitioner guilty. And even if Petitioner's evidence were enough to create a reasonable doubt about her guilt, it nevertheless failed to clearly and convincingly demonstrate that she did not murder Lael Brown.

A. The court correctly applied the proper legal standard to the evidence at the four-day evidentiary hearing.

As explained, Petitioner argued that she could prevail merely by showing that "no reasonable juror could have found her guilty beyond a reasonable doubt." PCR.2097-98; 2258:53. But as the court correctly concluded, the plain language and structure of the PCRA demonstrates that standard is incorrect. PCR.2104-06. First, that standard contradicts the statutory definition of "factual innocence": that "a person did not ...

engage in the conduct for which [she] was convicted." UTAH CODE ANN. § 78B-9-401.5(2)(a). That plain language required Petitioner to demonstrate that "she did not, in fact cause the death of Lael Brown." PCR.2103.

Second, the PCRA's general provisions allow a petitioner to obtain relief on newly discovered evidence if she can establish, among other things, that "'viewed with all the other evidence,' the newly discovered material evidence 'demonstrates that no reasonable trier of fact could have found the petitioner guilty.'" PCR.2104 (quoting UTAH CODE ANN. § 78B-9-104(1)(e)(iv)). But if the Legislature had intended this to also be the standard for determining factual innocence under the PCRA's factual innocence part, the Legislature would have simply used that language in the factual innocence statute. PCR.2105.

Third, as explained in Point I, the PCRA's general provisions provide significantly different relief than the factual innocence part. PCR.2105. The PCRA's general provisions entitle a petitioner, at most, to a new trial; the factual innocence part entitles a petitioner to exoneration and compensation. *See* UTAH CODE ANN. §§ 78B-9-108(1)(b), -404(4)(a), -405(1)(a).

Thus, Petitioner could not obtain a factual innocence determination merely by relying on the "'no reasonable trier of fact' standard." PCR.2105-06. As the post-conviction court explained, "raising doubt as to her underlying conviction, even strong doubt, is not the legal equivalent under the factual innocence statute of establishing that she did not, in fact, cause Lael Brown's death." PCR.2106.

As explained, the court relied on the correct legal standard when it discounted all of Petitioner's evidence at the four-day evidentiary hearing. PCR.2115-19. In the court's view, that evidence did not even meet the lower "no reasonable juror could have convicted" standard that Petitioner advocated. PCR.2117, 2119. Rather, the court concluded that "reasonable jurors still could have differed on what the old and new facts established and whether the prosecution could have proven its case beyond a reasonable doubt." PCR.2115-16. Because Petitioner's evidence could not even satisfy the general PCRA's lesser standard, the court correctly reasoned that the evidence necessarily could not satisfy the factual innocence statutes' higher standard. PCR.2105-06, 2115-19.

B. The court misapplied that standard to the evidence that Petitioner presented at the reopened hearing.

Petitioner's evidence at the reopened hearing was no more persuasive than her evidence in the four-day hearing. The post-conviction court thus erroneously concluded that Petitioner's evidence at the reopened hearing demonstrated her factual innocence by clear and convincing evidence. PCR.2120-2139.

Evidence is clear and convincing if it "carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind." *Greener v. Greener*, 212 P.2d 194, 204 (Utah 1949). In a recent dissenting opinion, Justice Durham relied on the United States Supreme Court's articulation of the clear and convincing standard: "clear and convincing evidence is that which 'place[s] in the ultimate factfinder an abiding

conviction that the truth of its factual contentions are highly probable. This would be true ... only if the material it offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence ... offered in opposition.'" *State v. Barzee*, 2007 UT 95, ¶ 51, 177 P.3d 48 (Durham, C.J., dissenting) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

As explained, the post-conviction court concluded that Petitioner had established her factual innocence because it viewed Hall's testimony as more persuasive than both Petitioner's evidence from the four-day hearing and the trial evidence. PCR.2115-19, 2135-36. The post-conviction court misconstrued the significance of Hall's testimony. Even when considered with all of Petitioner's other evidence, Hall's testimony did not clearly and convincingly establish that she did not kill Lael Brown. On the contrary, just as with Petitioner's evidence at the original hearing, a reasonable juror could hear all of Petitioner's evidence, including Hall's testimony, and still find Petitioner guilty.

First, a juror at Petitioner's 1995 trial who also heard Hall's testimony could still have found Petitioner guilty beyond a reasonable doubt. That juror could reasonably conclude that Hall was mistaken about seeing Lael Brown on the afternoon of Saturday, 6 November 1993, because substantial evidence contradicted Hall's assertion:

- None of the waitresses who worked at Angie's on that Saturday recalled seeing Lael that day. PCR.Petitioner's Exhibit 2, Tab 70 pp.101-07, 110-111. Lael was not just a regular customer; he visited Angie's "like clockwork" and was "always in there" by one account, four to eight times a day. *Id.* at pp. 101, 104, 107.
- The man that Hall allegedly saw with Lael has never come forward to confirm that he was with Lael on that Saturday afternoon.

- Lael did not answer numerous phone calls from his granddaughter and Clara on Saturday, even though Clara routinely called on Saturday mornings. TR.575-78 [26-29]
- Lael's truck was in his driveway from at least 10 a.m. to 4:30 p.m. TR.596-98 [87-89].
- Lael's neighbor, Standridge, was outside during that time and never saw Lael come or go or follow his usual practice of puttering around his yard. TR.596-98 [87-89].
- Lael never returned on Saturday to complete the plumbing repairs, despite his promise to do so. TR.556 [7]. Nor is there any evidence that Lael called to say that he would not be coming.
- Lael never picked up the soup that Petitioner said she left on his porch around 2 p.m. on that Saturday. TR.1326. By Petitioner's own admission, Lael's truck was in his driveway when she delivered the soup and he did not answer when she knocked on his door. TR.835-36, 1326; PCR.2257:85. Therefore, if Hall's testimony was correct, Lael would have had to step over the soup at least once—when returning from Angie's—and perhaps twice—when he left to go to Angie's—without bringing it in.

The post-conviction court dismissed the above evidence in a footnote by positing that "other plausible explanations, including that Lael was simply not feeling well, could also easily account for these facts." PCR.2133 n.17. But the theory that Lael may not have felt well enough to even answer the phone does not explain why he nevertheless felt well enough to go to Angie's in the early afternoon. At best, Hall's testimony raises only a jury question.

And even if the post-conviction court's conclusion is a reasonable one, it is not *the only* reasonable conclusion to be drawn from the evidence. A juror could reasonably weigh the evidence differently. Therefore, a juror at Petitioner's trial who also heard Hall's testimony could still find Petitioner guilty beyond a reasonable doubt.

The same is true for a juror who heard all of the evidence from both the trial and the factual innocence evidentiary hearing. None of Petitioner's evidence refuted the State's theory that only she had access, motive, and opportunity to murder Lael.

Access. First, it remains undisputed that Petitioner had access to Lael's house.

Motive. Second, Petitioner's motive, which was disputed at trial, is now established by her admission that she forged Lael's checks. A juror hearing all the evidence would now understand that Petitioner not only lied to police, but lied about the suspected motive for the murder.

That juror would also now know that Petitioner's son Ryan Buttars perjured himself at Petitioner's trial, and that his perjury likewise involved Petitioner's motive. He testified that he saw Lael write Petitioner a check for $1000 in September 1993. TR.902. However, the State's handwriting expert testified at trial that the $1000 check dated 27 September 1993 (check #1160) was traced using check #1077 as a model. TR.852-55. Petitioner now admits that she, not Lael wrote that check. PCR.2257:74-75.

The evidence also now establishes with even more certainty that Lael discovered Petitioner's forgeries before he was murdered. Just three days before the murder, Lael asked Clara if Petitioner had also been "cleaning her bank account out." TR.596 [47]. Although excluded at trial, this testimony was admissible at the factual innocence hearing. *See* UTAH CODE ANN. § 78B-9-404(2)(b) (allowing the court to consider hearsay evidence). Additionally, evidence adduced in the evidentiary hearing showed that a neighbor overheard Lael arguing with a woman on the evening of Friday, 5 November 1993. PCR.2256:93-95.

Although Petitioner produced evidence that mailings from Zion's Bank in other months may not have arrived at Lael's house by the 5th, she produced no evidence refuting the State's evidence that the October statement would have arrived by then. Nor did she produce any evidence that the October statement arrived after 5 November 1993. Indeed, neither police nor Lael's family ever received the original October statement. PCR.2256:42-43, 46. Additionally, Petitioner was concerned about the contents of Lael's mail after the murder—she contacted police wondering "if there was mail in Lael's mailbox, such as a lottery ticket." PCR.Petitioner's Exhibit 2, Tab 70, p.123.

Moreover, the bank records missing from Lael's house still implicated only Petitioner. Although one detective's memory seventeen years later was generally that several bank statements were missing, Petitioner's only evidence of which statements were actually missing was a document that police prepared during the murder investigation. PCR.Petitioner's Exhibit 2, Tab 59. That document listed only the September and October statements as missing. PCR.Petitioner's Exhibit 2, Tab 59. The September statement would have also contained checks that Petitioner admittedly forged. PCR.2257:74-75. Therefore, Lael could have recognized in early October that Petitioner was cleaning out his bank account when he received his September statement that included at least $1440 in forgeries.

In short, although Petitioner's motive was disputed at trial, her factual innocence evidence makes it undisputed. The evidence that Lael discovered Petitioner's forgeries and confronted her about them is also now even stronger.

Opportunity. Hall's and Nyman's evidentiary hearing testimony, if accurate, would refute the State's theory that Petitioner shot Lael early Saturday morning. But, as explained, a juror could reasonably find that Hall was mistaken, and that Nyman's trial testimony that she heard the gunshots on Saturday morning was more reliable than her evidentiary hearing testimony, given seventeen years after the event. Therefore, a reasonable juror could still find that Petitioner murdered Lael early Saturday morning.

But even if Hall's and Nyman's evidentiary hearing testimony were accurate, it still does not demonstrate Petitioner's factual innocence. Rather, it only negates the State's trial theory that Petitioner killed Lael early Saturday morning. But Petitioner cannot carry her burden merely by showing that she could not have killed Lael on Saturday morning. Rather, she must affirmatively show that she did not kill Lael Brown at any time. *See* UTAH CODE ANN. § 78B-9-401.5(2). Her evidence did not make that showing.

Given the substantial evidence that incriminated Petitioner, a reasonable juror could still find that she murdered Lael sometime after Hall allegedly saw him. A reasonable juror could also disagree with the post-conviction court's conclusion "that Petitioner's whereabouts from Saturday afternoon on November 6th to the early morning hours of Sunday November 7th, have been firmly established." PCR.2139. This is especially true because the evidence of Petitioner's whereabouts depends on her credibility, and a reasonable juror would have good reason to doubt her credibility where she admitted to having stolen from Lael and lied about it.

Moreover, although Petitioner's then-boyfriend (Skabelund) and her son (Buttars) corroborated parts of Petitioner's account of her whereabouts, both had a motive to lie for her. In fact, as explained, the jury would now know that Buttars perjured himself for her.

Significantly, Buttars provides the only corroboration for Petitioner's claim that she arrived home shortly after midnight on Sunday morning. TR.913, 920-21. According to the medical examiner, Petitioner could have killed Lael anytime before 3 a.m. Sunday morning. TR.1486-89. Therefore, even if Petitioner did not murder Lael early Saturday morning, a reasonable juror could still find that she murdered him late Saturday night or early Sunday morning.

Finally, the post-conviction court incorrectly concluded that "no evidence was presented to suggest that [Petitioner's] account of [her] whereabouts is inaccurate." PCR.2139. Two independent witnesses contradicted Petitioner's account that she was at her son's basketball game from 10:45 a.m. to 12:15 p.m. TR.630-33; PCR.2257:83. Lael's neighbor, Kim Standridge, testified that she saw Petitioner at Lael's house at noon on Saturday and the two made eye-contact and Petitioner waved. TR.598-600 [89-91]. Lael's granddaughter also saw Petitioner's truck at Lael's home around 11:15 a.m. and again around 11:45 a.m. on Saturday. TR.1687-92. A store receipt confirmed that timing. PCR.Petitioner's Exhibit 2, Tab 70, p.201. The evidence at trial therefore did not merely "suggest" that Petitioner's account of her whereabouts was inaccurate; it *demonstrated* that her account was inaccurate. The evidence thus still supports a reasonable conclusion that Petitioner had the opportunity to murder Lael, notwithstanding Hall's and Nyman's testimony.

In sum, the prosecution's theory that Petitioner had the access and motive to murder Lael is now even stronger than it was at trial. And the evidentiary hearing testimony from Hall and Nyman does not undermine the prosecution's theory as to Petitioner's opportunity because a reasonable juror could discount their testimony. But even assuming that their testimony was accurate, a reasonable juror could still find Petitioner guilty because serious credibility concerns surround Petitioner's account of her whereabouts.

Petitioner failed to meet her burden. Petitioner's evidence at the reopened hearing was no more persuasive than her evidence at the four-day hearing. Even after hearing all of Petitioner's evidence, a reasonable juror could still find her guilty. Because Petitioner's evidence did not prevent a reasonable juror from still finding her guilty, that evidence necessarily failed to demonstrate that she did not "engage in the conduct for which [she] was convicted." *See* UTAH CODE ANN. § 78B-9-401.5(2)(a).

For the same reasons, even if Petitioner's evidence did raise a reasonable doubt about her guilt, it still failed to clearly and convincingly demonstrate that she did not murder Lael. Petitioner's evidence did not "clinch[] what might be otherwise only probable to the mind." *See Greener*, 212 P.2d at 204. It did not "'place in the ultimate factfinder an abiding conviction'" of Petitioner's innocence, nor did it "'instantly tilt[] the evidentiary scales in the affirmative when weighed against the [prosecution's] evidence.'" *See Barzee*, 2007 UT 95, ¶ 51 (Durham, C.J., dissenting) (quoting *Colorado*, 467 U.S. at 316). Therefore, the court erred in concluding that Petitioner had shown by clear and convincing evidence that she did not kill Lael.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted 21 February 2012.

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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,960 words, excluding the table of contents, table of authorities, and addenda. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font, Times New Roman 13 point, using Microsoft Word 2000.

CERTIFICATE OF SERVICE

I hereby certify that on 21 February 2012 two accurate copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No

Addenda

Addendum A

Factual Innocence Part
2010 version

UTAH CODE ANN. § 78B-9-401 (West 2009). Title.

This part is known as "Postconviction Determination of Factual Innocence."

Enacted by Chapter 358, 2008 General Session

UTAH CODE ANN. § 78B-9-401.5 (West Supp. 2011) Definitions.

As used in this part:

(1) "Bona fide and compelling issue of factual innocence" means that the newly discovered material evidence presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner.

(2) "Factual innocence" or "factually innocent" means a person did not:

(a) engage in the conduct for which the person was convicted;

(b) engage in conduct relating to any lesser included offenses of the crime for which the person was convicted; or

(c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.

(3) "Newly discovered material evidence" means evidence that was not available to the petitioner at trial or during the resolution on the merits by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is relevant to the determination of the issue of factual innocence, and may also include:

(a) evidence which was discovered prior to or in the course of any appeal or postconviction proceedings that served in whole or in part as the basis for vacatur or reversal of the conviction of petitioner; or

(b) evidence that supports the claims within a petition filed under Part 1, General Provisions, which is pending at the time of the court's determination of factual innocence.

(4) "Period of incarceration" means any sentence of imprisonment, including jail, which was served after judgement of conviction.

Enacted by Chapter 153, 2010 General Session

UTAH CODE ANN. § 78B-9-402 (West Supp. 2011). Petition for determination of factual innocence—Sufficient allegations—Notification of victim.

(1) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted.

(2) (a) The petition shall contain an assertion of factual innocence under oath by the petitioner, and shall aver, with supporting affidavits or other credible documents, that:

(i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;

(ii) the specific evidence identified by the petitioner in the petition establishes innocence;

(iii) the material evidence is not merely cumulative of evidence that was known;

(iv) the material evidence is not merely impeachment evidence; and

(v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent.

(b) The court shall review the petition in accordance with the procedures in Subsection (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a). If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the attorney general.

(3) (a) The petition shall also contain an averment that:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

(ii) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence.

(b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the court finds that the requirements of

Subsection (3)(a) have not been satisfied, it may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may enter a finding that based upon the strength of the petition, the requirements of Subsection (3)(a) are waived in the interest of justice.

(4) If the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence. The court shall review the evidence and may dismiss the petition at any time in the course of the proceedings, if the court finds that the evidence of factual innocence relies solely upon the recantation of testimony or prior statements made by a witness against the petitioner, and the recantation appears to the court to be equivocal or self-serving.

(5) A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition under this part in the same manner and form as described above, if no retrial or appeal regarding this offense is pending.

(6) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

(7) Except as provided in Subsection (9), the petition shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number.

(8) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition.

(9) (a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general.

(b) The assigned judge shall conduct an initial review of the petition. If it is apparent to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear frivolous or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal upon the petitioner and the attorney general. If, upon completion of the initial review, the court does not dismiss the petition, it

shall order the attorney general to file a response to the petition. The attorney general shall, within 30 days after receipt of the court's order, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(c) After the time for response by the attorney general under Subsection (9)(b) has passed, the court shall order a hearing if it finds the petition meets the requirements of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted. No bona fide and compelling issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the petitioner's factual innocence.

(d) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.

(10) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.

(11) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.

(12) A petition to determine factual innocence under this part, or Part 3, Postconviction Testing of DNA, shall be filed separately from any petition for postconviction relief under Part 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

(13) The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending and any new petitions filed on or after the effective date of this amendment.

Amended by Chapter 153, 2010 General Session

UTAH CODE ANN. § 78B-9-403 (West 2009). Requests for appointment of counsel—Appeals—Postconviction petitions.

(1) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(2) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

Enacted by Chapter 358, 2008 General Session

UTAH CODE ANN. § 78B-9-404 (West Supp. 2011). Hearing upon petition—Procedures—Court determination of factual innocence.

(1)(a) In any hearing conducted under this part, the Utah attorney general shall represent the state.

(b) The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence.

(2) The court may consider:

(a) evidence that was suppressed or would be suppressed at a criminal trial; and

(b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.

(3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, the record of the original criminal case and at any postconviction proceedings in the case.

(4) If the court, after considering all the evidence, determines by clear and convincing evidence that the petitioner:

(a) is factually innocent of one or more offenses of which the petitioner was convicted, the court shall order that those convictions:

(i) be vacated with prejudice; and

(ii) be expunged from the petitioner's record; or

(b) did not commit one or more offenses of which the petitioner was convicted, but the court does not find by clear and convincing evidence that the petitioner did not commit any lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence

of the petitioner as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(5) (a) If the court, after considering all the evidence, does not determine by clear and convincing evidence that the petitioner is factually innocent of the offense or offenses the petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny the petition regarding the offense or offenses.

(b) If the court finds that the petition was brought in bad faith, it shall enter the finding on the record, and the petitioner may not file a second or successive petition under this section without first applying to and obtaining permission from the court which denied the prior petition.

(6) At least 30 days prior to a hearing on a petition to determine factual innocence, the petitioner and the respondent shall exchange information regarding the evidence each intends to present at the hearing. This information shall include:

(a) a list of witnesses to be called at the hearing; and

(b) a summary of the testimony or other evidence to be introduced through each witness, including any expert witnesses.

(7) Each party is entitled to a copy of any expert report to be introduced or relied upon by that expert or another expert at least 30 days prior to hearing.

Amended by Chapter 153, 2010 General Session

UTAH CODE ANN. § 78B-9-405 (West Supp. 2011). Judgment and assistance payment.

(1) (a) If a court finds a petitioner factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.

(b) As used in this Subsection (1), "petitioner" means a United States citizen or an individual who was otherwise lawfully present in this country at the time of the incident that gave rise to the underlying conviction.

(2) Payments pursuant to this section shall be made as follows:

(a) The Utah Office for Victims of Crime shall pay from the Crime Victim Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum equal to either 20% of the total financial assistance payment as determined under Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the total amount owed.

(b) The Legislature shall appropriate as nonlapsing funds from the General Fund, and no later than the next general session following the issuance of the court order under Subsection (1):

(i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund under Subsection (2)(a); and

(ii) to the Commission on Criminal and Juvenile Justice, as a separate line item, the amount ordered by the court for payments under Subsection (1), minus the amount reimbursed to the Crime Victim Reparations Fund under Subsection (2)(b)(i).

(c) Payments to the petitioner under this section, other than the payment under Subsection (2)(a), shall be made by the Commission on Criminal and Juvenile Justice quarterly on or before the last day of the month next succeeding each calendar quarterly period.

(d) Payments under Subsection (2)(c) shall:

(i) commence no later than one year after the effective date of the appropriation for the payments;

(ii) be made to the petitioner for the balance of the amount ordered by the court after the initial payment under Subsection (2)(a); and

(iii) be allocated so that the entire amount due to the petitioner under this section has been paid no later than 10 years after the effective date of the appropriation made under Subsection (2)(b).

(3) (a) Payments pursuant to this section shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.

(b) (i) Payments pursuant to this section shall be tolled upon the commencement of any period of incarceration due to the petitioner's subsequent conviction of a felony and shall resume upon the conclusion of that period of incarceration.

(ii) As used in this section, "felony" means a criminal offense classified as a felony under Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed in Utah.

(c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part.

(4) (a) A person is ineligible for any payments under this part if the person was already serving a prison sentence in another jurisdiction at the time of the conviction of the crime for which that person has been found factually innocent pursuant to Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part, and that person is to be returned to that other jurisdiction upon release for further incarceration on the prior conviction.

(b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by the same court that finds a person to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part.

(5) Payments pursuant to this section:

(a) are not subject to any Utah state taxes; and

(b) may not be offset by any expenses incurred by the state or any political subdivision of the state, including expenses incurred to secure the

petitioner's custody, or to feed, clothe, or provide medical services for the petitioner.

(6) If a court finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part, the court shall also:

(a) issue an order of expungement of the petitioner's criminal record for all acts in the charging document upon which the payment under this part is based; and

(b) provide a letter to the petitioner explaining that the petitioner's conviction has been vacated on the grounds of factual innocence and indicating that the petitioner did not commit the crime or crimes for which the petitioner was convicted and was later found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part.

(7) A petitioner found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or this part shall have access to the same services and programs available to Utah citizens generally as though the conviction for which the petitioner was found to be factually innocent had never occurred.

(8) Payments pursuant to this part constitute a full and conclusive resolution of the petitioner's claims on the specific issue of factual innocence.

Amended by Chapter 131, 2011 General Session

Addendum B

Factual Innocence Part
2008 version

UTAH CODE ANN. § 78B-9-401 (2008). Title

This part is known as "Postconviction Determination of Factual Innocence."

UTAH CODE ANN. § 78B-9-402 (2008). Petition for determination of factual innocence—Sufficient allegations—Notification of victim

As used in this part:

(1) "Factually innocent" means a person did not:

(a) engage in the conduct for which the person was convicted;

(b) engage in conduct relating to any lesser included offenses; or

(c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.

(2)(a) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted, if the person asserts factual innocence under oath and the petition alleges:

(i) newly discovered material evidence exists that establishes that the petitioner is factually innocent;

(ii) the petitioner identifies the specific evidence the petitioner claims establishes innocence;

(iii) the material evidence is not merely cumulative of evidence that was known;

(iv) the material evidence is not merely impeachment evidence;

(v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent; and

(vi)(A) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence;

(B) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence; or

(C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the interest of justice.

(b) A person who has already obtained postconviction relief that vacated or reversed the person's conviction may also file a petition under this part if no retrial or appeal regarding this offense is pending.

(3) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

(4) The petition shall be in compliance with Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number.

(5) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition.

(6)(a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general. The attorney general shall, within 30 days after receipt of service of the notice, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(b)(i) After the time for response by the attorney general under Subsection (6)(a) has passed, the court shall order a hearing if it finds there is a bona fide issue as to whether the petitioner is factually innocent of the charges of which the petitioner was convicted.

(ii) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.

(7) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.

(8) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.

UTAH CODE ANN. § 78B-9-403 (2008). Requests for appointment of counsel—Appeals—Postconviction petitions

(1) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(2) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

UTAH CODE ANN. § 78B-9-404 (2008). Hearing upon petition—Procedures—Court determination of factual innocence

(1)(a) In any hearing conducted under this part, the Utah attorney general shall represent the state.

(b) The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence.

(2) The court may consider:

(a) evidence that was suppressed or would be suppressed at a criminal trial; and

(b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.

(3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, all the evidence presented at the original trial and at any postconviction proceedings in the case.

(4) If the court, after considering all the evidence, determines by clear and convincing evidence that the petitioner:

(a) is factually innocent of one or more offenses of which the petitioner was convicted, the court shall order that those convictions:

(i) be vacated with prejudice; and

(ii) be expunged from the petitioner's record; or

(b) did not commit one or more offenses of which the petitioner was convicted, but the court does not find by clear and convincing evidence that the petitioner did not commit any lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the petitioner as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(5)(a) If the court, after considering all the evidence, does not determine by clear and convincing evidence that the petitioner is factually innocent of the offense or offenses the petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny the petition regarding the offense or offenses.

(b) If the court finds that the petition was brought in bad faith, it shall enter the finding on the record, and the petitioner may not file a second or successive petition under this section without first applying to and obtaining permission from the court which denied the prior petition.

UTAH CODE ANN. § 78B-9-405 (2008). Judgment and assistance payment

(1)(a) If a court finds a petitioner factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.

(b) As used in this Subsection (1), "petitioner" means a United States citizen or an individual who was otherwise lawfully present in this country at the time of the incident that gave rise to the underlying conviction.

(2) Payments pursuant to this section shall be made as follows:

(a) The Office of Crime Victim Reparations shall pay from the Crime Victim Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum equal to either 20% of the total financial assistance payment as determined under Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the total amount owed.

(b) The Legislature shall appropriate as nonlapsing funds from the General Fund, and no later than the next general session following the issuance of the court order under Subsection (1):

(i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund under Subsection (2)(a); and

(ii) to the Commission on Criminal and Juvenile Justice, as a separate line item, the amount ordered by the court for payments under Subsection (1),

minus the amount reimbursed to the Crime Victim Reparations Fund under Subsection (2)(b)(i).

(c) Payments to the petitioner under this section, other than the payment under Subsection (2)(a), shall be made by the Commission on Criminal and Juvenile Justice quarterly on or before the last day of the month next succeeding each calendar quarterly period.

(d) Payments under Subsection (2)(c) shall:

(i) commence no later than one year after the effective date of the appropriation for the payments;

(ii) be made to the petitioner for the balance of the amount ordered by the court after the initial payment under Subsection (2)(a); and

(iii) be allocated so that the entire amount due to the petitioner under this section has been paid no later than ten years after the effective date of the appropriation made under Subsection (2)(b).

(3)(a) Payments pursuant to this section shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.

(b)(i) Payments pursuant to this section shall be tolled upon the commencement of any period of incarceration due to the petitioner's subsequent conviction of a felony and shall resume upon the conclusion of that period of incarceration.

(ii) As used in this section, "felony" means a criminal offense classified as a felony under Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed in Utah.

(c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(4)(a) A person is ineligible for any payments under this part if the person was already serving a prison sentence in another jurisdiction at the time of the conviction of the crime for which that person has been found factually innocent pursuant to Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part, and that person is to be returned to that other jurisdiction upon release for further incarceration on the prior conviction.

(b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by the same court that finds a person to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(5) Payments pursuant to this section:

(a) are not subject to any Utah state taxes; and

(b) may not be offset by any expenses incurred by the state or any political subdivision of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or provide medical services for the petitioner.

(6) If a court finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part, the court shall also:

(a) issue an order of expungement of the petitioner's criminal record for all acts in the charging document upon which the payment under this part is based; and

(b) provide a letter to the petitioner explaining that the petitioner's conviction has been vacated on the grounds of factual innocence and indicating that the petitioner did not commit the crime or crimes for which the petitioner was convicted and was later found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(7) A petitioner found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part shall have access to the same services and programs available to Utah citizens generally as though the conviction for which the petitioner was found to be factually innocent had never occurred.

(8) Payments pursuant to this part constitute a full and conclusive resolution of the petitioner's claims on the specific issue of factual innocence.

Addendum C

Post-Conviction Remedies Act, Parts 1-3
2010 version

UTAH CODE ANN. § 78B-9-101 (West 2009). Title.

This chapter is known as the "Post-Conviction Remedies Act."

UTAH CODE ANN. § 78B-9-102 (West 2009). Replacement of prior remedies.

(1) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

UTAH CODE ANN. § 78B-9-103 (West 2009). Applicability -- Effect on petitions.

Except for the limitation period established in Section 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

UTAH CODE ANN. § 78B-9-104 (West Supp. 2011). Grounds for relief -- Retroactivity of rule.

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or

the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA , or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3 or Part 4 of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3 or Part 4.

UTAH CODE ANN. § 78B-9-105 (West 2009). Burden of proof.

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

UTAH CODE ANN. § 78B-9-106 (West Supp. 2011). Preclusion of relief -- Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78B-9-107.

(2) (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

UTAH CODE ANN. § 78B-9-107 (West 2009). Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

UTAH CODE ANN. § 78B-9-108 (West 2009). Effect of granting relief -- Notice.

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

UTAH CODE ANN. § 78B-9-109 (West 2009). Appointment of pro bono counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

UTAH CODE ANN. § 78B-9-110 (West 2009). Appeal -- Jurisdiction.

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103.

UTAH CODE ANN. § 78B-9-201 (West 2009). Post-conviction remedies -- 30 days.

A post-conviction remedy may not be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds for application are based on facts or circumstances which developed or first became known within that period of time.

UTAH CODE ANN. § 78B-9-202 (West Supp. 2011). Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.

(2) (a) If a petitioner requests the court to appoint counsel, the court shall determine whether the petitioner is indigent and make findings on the record regarding the petitioner's indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint counsel who is qualified to represent petitioners in postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(b) A petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(3) Attorney fees and litigation expenses incurred in providing the representation provided for in this section and that the court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules

established pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(a) In determining whether the requested funds are reasonable, the court should consider:

(i) the extent to which the petitioner requests funds to investigate and develop evidence and legal arguments that duplicate the evidence presented and arguments raised in the criminal proceeding; and

(ii) whether the petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support postconviction relief.

(b) The court may authorize payment of attorney fees at a rate of $125 per hour up to a maximum of $60,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(c) The court may authorize litigation expenses up to a maximum of $20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.

(e) In determining whether good cause exists to exceed the maximum sums established in Subsections (3)(b) and (c), the court shall consider:

(i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and

(ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support postconviction relief.

(f) The court may permit payment in excess of the maximum amounts established in Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

(i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney general employed in a division other than the one in which the attorney is employed who

represents the state in the postconviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the postconviction matter with the motion to exceed the maximum funds;

(ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney general may not disclose to the attorney representing the state in the postconviction matter any material the petitioner provides in support of the motion except upon a determination by the court that the material is not protected by or that the petitioner has waived the attorney client privilege or work product doctrine; and

(iii) the court gives the state an opportunity to respond to the request for funds in excess of the maximum amounts provided in Subsections (3)(b) and (c).

(4) Nothing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.

(5) If within 60 days of the request for counsel the court cannot find counsel willing to accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In that event, the petitioner may elect to proceed pro se by serving written notice of that election on the court and state's counsel within 30 days of the court's notice that no counsel could be found. If within 30 days of its notice to the petitioner the court receives no notice that the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction actions and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to issue an execution warrant.

(6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may not be appointed at public expense for a petitioner, except to raise claims:

(a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i); or

(b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any previously filed post trial motion or postconviction proceeding.

UTAH CODE ANN. § 78B-9-300 (West 2009). Title.

This part is known as "Postconviction DNA Testing."

UTAH CODE ANN. § 78B-9-301 (West Supp. 2011). Postconviction testing of DNA -- Petition -- Sufficient allegations -- Notification of victim.

(1) As used in this part:

(a) "DNA" means deoxyribonucleic acid.

(b) "Factually innocent" has the same definition as in Section 78B-9-402.

(2) A person convicted of a felony offense may at any time file a petition for postconviction DNA testing in the trial court that entered the judgment of conviction if the person asserts factual innocence under oath and the petition alleges:

(a) evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted;

(b) the chain of custody is sufficient to establish that the evidence has not been altered in any material aspect;

(c) the person identifies the specific evidence to be tested and states a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(d) the evidence was not previously subjected to DNA testing, or if the evidence was tested previously, the evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing;

(e) the proposed DNA testing is generally accepted as valid in the scientific field or is otherwise admissible under Utah law;

(f) the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's factual innocence; and

(g) the person is aware of the consequences of filing the petition, including:

(i) those specified in Sections 78B-9-302 and 78B-9-304; and

(ii) that the person is waiving any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison.

(3) The petition under Subsection (2) shall comply with Rule 65C, Utah Rules of Civil Procedure, including providing the underlying criminal case number.

(4) The court may not order DNA testing in cases in which DNA testing was available at the time of trial and the person did not request DNA testing or present DNA evidence for tactical reasons.

(5) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel have a duty to cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.

(6) (a) A person who files a petition under this section shall serve notice upon the office of the prosecutor who obtained the conviction, and upon the Utah attorney general. The attorney general shall, within 30 days after receipt of service of a copy of the petition, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(b) After the attorney general is given an opportunity to respond to a petition for postconviction DNA testing, the court shall order DNA testing if it finds by a preponderance of the evidence that all criteria of Subsection (2) have been met.

(7) (a) If the court grants the petition for testing, the DNA test shall be performed by the Utah State Crime Laboratory within the Criminal Investigations and Technical Services Division created in Section 53-10-103, unless the person establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing.

(b) If the court orders that the testing be conducted by any laboratory other than the state crime laboratory, the court shall require that the testing be performed:

(i) under reasonable conditions designed to protect the state's interests in the integrity of the evidence; and

(ii) according to accepted scientific standards and procedures.

(8) (a) DNA testing under this section shall be paid for from funds appropriated to the Department of Public Safety under Subsection 53-10-407(4)(d)(ii) from the DNA Specimen Restricted Account created in Section 53-10-407 if:

(i) the court ordered the DNA testing under this section;

(ii) the Utah State Crime Laboratory within the Criminal Investigations and Technical Services Division has a conflict of interest or does not have the capability to perform the necessary testing; and

(iii) the petitioner who has filed for postconviction DNA testing under Section 78B-9-201 is serving a sentence of imprisonment and is indigent.

(b) Under this Subsection (8), costs of DNA testing include those necessary to transport the evidence, prepare samples for analysis, analyze the evidence, and prepare reports of findings.

(9) If the person is serving a sentence of imprisonment and is indigent, the state shall pay for the costs of the testing under this part, but if the result is not favorable to the person the court may order the person to reimburse the state for the costs of the testing, pursuant to the provisions of Subsections 78B-9-302(4) and 78B-9-304(1)(b).

(10) Any victim of the crime regarding which the person petitions for DNA testing, who has elected to receive notice under Section 77-38-3 shall be notified by the state's attorney of any hearing regarding the petition and testing, even though the hearing is a civil proceeding.

UTAH CODE ANN. § 78B-9-302 (West 2009). Effect of petition for postconviction DNA testing -- Requests for appointment of counsel -- Appeals -- Subsequent postconviction petitions.

(1) The filing of a petition for DNA testing constitutes the person's consent to provide samples of body fluids for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement DNA databases.

(3) The filing of a petition for DNA testing constitutes the person's waiver of any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison.

(4) The person filing the petition for postconviction DNA testing bears the cost of the testing unless:

(a) the person is serving a sentence of imprisonment;

(b) the person is indigent; and

(c) the DNA test is favorable to the petitioner.

(5) (a) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(b) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

UTAH CODE ANN. § 78B-9-303 (West 2009). Consequences of postconviction DNA testing when result is favorable to person -- Procedures.

(1) (a) If the result of postconviction DNA testing is favorable to the person, the person may file a motion to vacate the conviction. The court shall give the state 30 days to respond in writing, to present evidence, and to be heard in oral argument prior to issuing an order to vacate the conviction. The state may by motion request an extension of the 30 days, which the court may grant upon good cause shown.

(b) The state may stipulate to the conviction being vacated, or may request a hearing and attempt to demonstrate through evidence and argument that, despite the DNA test results, the state possesses sufficient evidence of the person's guilt so that the person is unable to demonstrate by clear and convincing evidence that the person is factually innocent of one or more offenses of which the person was convicted, and all the lesser included offenses related to those offenses.

(2) (a) (i) If the result of postconviction DNA testing is favorable to the person and the state opposes vacating the conviction, the court shall consider all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result.

(ii) The court may consider:

(A) evidence that was suppressed or would be suppressed at a criminal trial; and

(B) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.

(b) If the court, after considering all the evidence, determines that the DNA test result demonstrates by clear and convincing evidence that the person is factually innocent of one or more offenses of which the person was convicted, the court shall order that those convictions be vacated with prejudice and those convictions be expunged from the person's record.

(c) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, finds by clear and convincing evidence that the person did not commit one or more offenses of which the person was convicted, but the court does not find by clear and convincing evidence that the person did not commit any lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the person as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(d) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, does not find by clear and convincing evidence that the person is factually innocent of the offense or offenses the person is challenging and does not find that Subsection (2)(c) applies, the court shall deny the person's petition regarding the offense or offenses.

(e) Any party may appeal from the trial court's final ruling on the petition under this part.

UTAH CODE ANN. § 78B-9-304 (West 2009). Consequences of postconviction DNA testing when result is unfavorable to person -- Procedures.

(1) If the result of postconviction DNA testing is not favorable to the person, the court shall deny the person's petition, and the court shall:

(a) report the unfavorable result to the Board of Pardons and Parole; and

(b) order the person to pay for the costs of the DNA testing unless the petitioner has already paid that cost.

(2) This section does not apply if the DNA test is inconclusive.

Addendum D

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

MAY - 2 2011

DEBRA BROWN, Petitioner, vs. STATE OF UTAH, Respondent.	**MEMORANDUM DECISION RE: POST-CONVICTION DETERMINATION OF FACTUAL INNOCENCE** Case No. 100903670 Judge Michael D. DiReda

FILED
MAY - 2 2011
SECOND
DISTRICT COURT

THIS MATTER COMES BEFORE THE COURT for a determination of factual innocence pursuant to Petitioner's Petition for Post-Conviction Determination of Factual Innocence filed on March 4, 2009. The Court held an evidentiary hearing in this matter from January 18–24, 2011, and on March 7, 2011. Petitioner, Ms. Debra Brown, was present and represented by her counsel Alan Sullivan, Christopher Martinez, and Jacqueline Hopkinson. The State of Utah was present and represented by Assistant Attorneys General Scott Reed and Patrick Nolan.

The Court has thoroughly reviewed the pleadings in this case, the supporting exhibits, the arguments of counsel, the relevant case law, and all applicable statutory provisions. Additionally, the Court has carefully considered all of the evidence presented at the aforementioned hearing held in this case as well as the evidence contained in the record of the original criminal case. Having done so, and now being fully advised, the Court issues the following decision determining that Petitioner is factually innocent of the offense for which she was convicted.

I. PROCEDURAL BACKGROUND

On the morning of November 7, 1993, Petitioner discovered the body of her long-time friend and employer Lael Brown ("Lael"). He had been shot three times in the head while he lay in his bed. Approximately ten months later, Petitioner was arrested, and on September 12, 1994, the Cache County Attorney's Office charged her with one count of aggravated murder. Following a jury trial, Petitioner was convicted on October 18, 1995, of the crime of aggravated murder as charged and was subsequently sentenced to life in prison on December 11, 1995. On January 19, 1996, Petitioner timely filed an appeal challenging the sufficiency of evidence used to convict her. The Utah Supreme Court entered its decision affirming Petitioner's conviction on October 24, 1997. *See State v. Brown*, 948 P.2d 337 (Utah 1997). Petitioner did not seek review of the decision from the United States Supreme Court.

In 2002, the Rocky Mountain Innocence Center ("RMIC") began an investigation into Petitioner's case. On March 3, 2005, Petitioner filed a Verified Petition for Post-Conviction DNA Testing in the First Judicial District and Judge Gordon Low was assigned. On July 28, 2005, Judge Low granted the petition, and the Utah State Crime Laboratory tested a DNA sample collected from a bullet and a fingerprint collected from a shell casing. The Utah State Crime Laboratory determined that the DNA profile matched the victim's blood standard and did not detect and/or identify any comparable ridge detail on the shell casings. In light of this outcome, Judge Low ultimately dismissed the case on September 6, 2006.

On March 4, 2009, Petitioner filed both a petition for post-conviction relief[1] pursuant to Part 1 of the Post-Conviction Remedies Act ("PCRA") and a petition for post-conviction

[1] On December 21, 2010, the Court granted the State's motion for summary judgment on the petition for post-conviction relief. The Court denied Petitioner's request for reconsideration on January 14, 2011.

determination of factual innocence under Part 4 of the PCRA. Both cases were assigned to Judge Kevin Allen. In response to the petition filed under the factual innocence statute, the State filed a motion to dismiss on May 11, 2009. Petitioner filed her memorandum in opposition to the motion on June 11, 2009. On August 3, 2009, Judge Allen denied the State's motion and specifically found that "a bona fide issue does exist as to whether Petitioner is factually innocent." Mem. Decision, August 3, 2009, at 10. The parties subsequently engaged in discovery, and on January 19, 2010, the Court scheduled five days in May of 2010 for an evidentiary hearing pursuant to section 78B-9-402(9)(c).

However, on May 11, 2010, prior to the evidentiary hearing, Judge Allen recused himself from hearing the case in accordance with Canon 2.11 of the Code of Judicial Conduct due to unsolicited communications made to him about the case. Petitioner's case was then promptly transferred from the First Judicial District in Logan to the Second Judicial District in Ogden, and the undersigned judge was assigned to the case. Following the resolution of various legal issues, the Court held an evidentiary hearing on January 18–24, 2011. On January 26, 2011, the Court convened a telephone conference with counsel and raised a concern with respect to two pieces of evidence. After further investigation by the parties, the Court re-opened the case for the limited purpose of receiving additional testimony on these items of evidence. At the conclusion of the evidentiary hearing on March 7, 2011, the Court took the case under advisement.

II. SUMMARY OF THE ARGUMENTS

A. Petitioner

Petitioner argues that, in the context of her case, she establishes that she is factually innocent if she demonstrates that the State's circumstantial case against her was and is factually unsupportable. In other words, Petitioner argues that she must demonstrate by clear and

convincing evidence that in light of the new evidence presented during the evidentiary hearing as well as all the evidence presented in the underlying criminal case, no reasonable juror could have found her guilty beyond a reasonable doubt.[2] Petitioner argues that she has satisfied this burden. According to Petitioner, during the State's case at trial, the jury was asked to consider the facts that separated her from all other persons who may have had some connection to Lael—for example, people who owed Lael money, who might have had a grudge or harbored ill-will against him, who knew he had guns and cash at his home, who may have had insurance on him, and anyone else who may have had a motive to kill him. Petitioner further asserts that the prosecutors argued to the jury that after a careful investigation of all possible suspects, they focused on Petitioner because she was the only person who could not account for her whereabouts at the time the prosecutors argued the murder was committed and because she was the only person who had the motive and opportunity to kill Lael.

However, based upon evidence Petitioner characterizes as newly discovered, she argues that it is clear there is no longer any support for the State's circumstantial case against her. This new evidence includes the following: (1) information from the Logan City Police Department ("LPD") that Bobbie Sheen was a possible suspect; (2) statements from Sylvan Bassett identifying Sheen as the likely perpetrator of the homicide, including that Sheen was angry with

[2] Counsel for Petitioner repeated this standard—"no reasonable jury *could* have found her guilty"—several times during his closing argument. Counsel also referred the Court to two decisions from the United States Supreme Court to support his contention that this is the correct standard that should apply under Utah's factual innocence statute. However, in the first case counsel provided, *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court set forth the standard as follows: "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror *would* have found petitioner guilty beyond a reasonable doubt.'" *Id.* at 536-37 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)) (emphasis added). Moreover, in the second case, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the standard was expressed in terms of "show[ing] a fair probability that . . . the trier of the facts *would* have entertained a reasonable doubt of his guilt." *Id.* at 454 (emphasis added).

Lael, that he had a gun similar in appearance to the gun that was likely used to kill Lael, that he had a large amount of cash sometime after the homicide was committed, and that he drove a blue and white Ford Bronco similar to a car seen at Lael's home by neighbors the day Lael was murdered; (3) witness statements and information from LPD files showing that neighbors of Lael, including Paulette Nyman, heard gunshots at times contrary to the time of death relied upon by the prosecution and only at times when Petitioner had a solid alibi; (4) police notes and bank documents indicating that Petitioner reported to police that she owed Lael $3,000, that the October bank statement never arrived at Lael's home, that many people knew that Lael had guns in his house and large amounts of money, that Lael's home was not secure, but was easily accessible, and that Petitioner was not the only person with a key to Lael's home; and (5) internal law enforcement notes indicating that LPD mishandled the crime scene, failed to collect important physical evidence, failed to test blood evidence, and failed to properly follow-up on leads in the case that could have identified the true perpetrator.

Petitioner asserts that in light of all of the forgoing newly discovered evidence, she has shown that each element of the State's circumstantial case, namely motive, opportunity, the lack of other possible suspects, and time of death, is false and factually unsupportable. She argues, therefore, that she has established by clear and convincing evidence that no reasonable juror could have found her guilty beyond a reasonable doubt had the jury been presented with these newly discovered facts. On this basis she asserts that she has shown that she is factually innocent of the crime for which she was convicted.

B. Respondent

In response, the State argues that the factual innocence statute requires Petitioner to establish that she did not engage in the conduct for which she was convicted. In other words, it

is not enough for Petitioner to show that the police investigation could have been better or that her trial attorneys should have done more to avoid a conviction. Indeed, according to the State, regardless of how poorly the police investigated the case and/or how deficiently trial counsel performed, these facts, in and of themselves, do not demonstrate that Petitioner did not commit the murder. The State argues that Petitioner cannot be found factually innocent because, despite all of the alleged newly discovered evidence presented by her, a rational basis still exists for the conviction. In sum, the State contends that the evidence presented at trial regarding Petitioner's conduct and both her motive and opportunity to commit the murder have not been rebutted. Thus, because Petitioner has not shown by clear and convincing evidence that she did not engage in the conduct for which she was convicted, the State argues that she has not shown that she is factually innocent, and there is no legal reason to disturb the guilty verdict.

III. ANALYSIS

A. Introduction

In 2008 "the Utah Legislature enacted the Factual Innocence Statute, the core purpose of which is to provide justice, in the form of monetary compensation, for individuals who have been found factually innocent of a crime for which they were previously convicted and incarcerated." *Miller v. State*, 2010 UT App 25, ¶ 7, 226 P.3d 743. Citing to the floor debates in the Utah State Senate, the Court of Appeals noted that the statute was enacted "out of 'concern for those who might be trampled upon in the grinding process of the law, which happens,' and to 'compensat[e] folks who have been dealt a very heavy and unjust blow.'" *Id.* (citing Recording of Utah Senate Floor Debates, 58th Leg., Gen. Sess. (Jan. 23, 2008) (statement of Sen. Bell on Senate Bill 016), *available at* http://le.utah.gov/asp/audio/index.asp). Procedurally, the factual innocence statute establishes a "two-step claim process: an individual must first petition the court

for a hearing to determine factual innocence, and if the petition meets the requirements of section 78B-9-402, a hearing will be held at which the petitioner bears the burden of proving factual innocence by clear and convincing evidence." *Id.*

As required by step one, on March 4, 2009, Petitioner filed a petition for post-conviction determination of factual innocence. Judge Allen performed an initial review of the petition and determined that the petition identified with specificity newly discovered material evidence that, if credible, would establish Petitioner's factual innocence; that the evidence was not merely cumulative of evidence already known, that the evidence was not merely impeachment evidence; and that; when "viewed with all the other evidence, the newly discovered evidence demonstrates that [Petitioner] is factually innocent." Utah Code Ann. § 78B-9-402(2)(a)(v). Judge Allen also necessarily found that it was not apparent that Petitioner was "either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear[ed] frivolous or speculative on their face." Utah Code Ann. § 78B-9-402(9)(b). After completing the initial review, on March 11, 2009, Judge Allen issued an order requiring the State to respond.

In response, the State filed a motion to dismiss the petition. After considering the State's motion to dismiss, on July 16, 2009, Judge Allen found that "there [was] a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted." Utah Code Ann. § 78B-9-402(9)(c). Although not expressly stated in his ruling, Judge Allen also necessarily determined that the petition satisfied subsections (2) and (3) of section 78B-9-402, that Petitioner was not "merely relitigating facts, issues, or evidence presented in a previous proceeding . . . [and that Petitioner was] []able to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes [her] factual innocence." Utah Code Ann. § 78B-9-402(9)(c). In light of these findings, Judge Allen

granted the petition and proceeded to step two by ordering that a hearing be convened for the purpose of allowing the parties to present evidence relevant to the determination of factual innocence.

B. The Factual Innocence Statute

1. Legal Standard

Under Utah's factual innocence statute, Petitioner is factually innocent if, based upon a consideration of all the evidence presented at the hearing on the petition as well as all the evidence in the record of the original criminal case,[3] the Court finds by clear and convincing evidence[4] that Petitioner

> did not (a) engage in the conduct for which [she] was convicted; (b) engage in conduct relating to any lesser included offenses of the crime for which [she] was convicted; or (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which [she] was convicted.[5]

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[3] *See* Utah Code Ann. § 78B-9-404(3).

[4] *See* Utah Code Ann. § 78B-9-404(4) (trial court must consider "all the evidence" and "determine[] by clear and convincing evidence" that the petitioner is factually innocent).

[5] In the Court's view, only subsection (a) is relevant to Petitioner's case. The State has not argued that Petitioner is not factually innocent because she engaged in conduct relating to a lesser included offense of the crime for which she was convicted. However, in arguing for involuntary dismissal under rule 41 of the Utah Rules of Civil Procedure at the conclusion of Petitioner's presentation of evidence at the January 18-24, 2011, evidentiary hearing, the State asserted that the Court could not find Petitioner factually innocent in part because the jury, in convicting her of aggravated murder, necessarily also concluded beyond a reasonable doubt that she had forged at least one of Lael's checks and, therefore, that the homicide was committed under the pecuniary gain aggravating circumstance. Moreover, Petitioner herself testified during the evidentiary hearing that she, in fact, forged several of Lael's checks. Based upon this evidence, the State argued that since commission of the forgeries is a felony offense "arising out of or reasonably connected to the facts supporting the . . . information upon which [Petitioner] was convicted," Utah Code Ann. § 78B-9-401.5(2)(c), Petitioner cannot show that she did not engage in conduct reasonably connected to the facts supporting the information upon which she was convicted. Therefore, she cannot demonstrate that she is factually innocent as that term is defined under Section 78B-9-401.5(2)(c). For the reasons set forth below, the Court rejected the State's argument.

Under the State's interpretation of Section 78B-9-401.5(2)(c), because Petitioner has admitted that she forged Lael's checks, which is the offense constituting the pecuniary gain aggravating circumstance under which Petitioner was charged, no set of facts exists that would warrant concluding that she is factually innocent of aggravated murder. Clearly, however, the State's interpretation could result in an absurd and obviously unjust outcome. Under the State's interpretation, even if a petitioner unequivocally demonstrates that she did not

Utah Code Ann. § 78B-9-401.5(2)(a)-(c). A plain reading of the statute's language requires that in order to be found factually innocent, Petitioner must demonstrate by clear and convincing evidence[6] that she did not, in fact, cause the death of Lael Brown. In the context of Petitioner's case, this is accomplished if she affirmatively establishes, based upon all the evidence, that she is not the person who committed the homicide. Importantly, this standard is different from establishing one's *legal* innocence. A person is legally innocent when the trier of fact concludes based upon the evidence presented, that a reasonable doubt exists that the person committed the crime for which she was tried. "[B]ecause of the heavy burden of proof in a criminal case, an acquittal doesn't mean that the defendant did not commit the crime for which [the defendant] was tried; all it means is that the government was not able to prove beyond a reasonable doubt

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intentionally or knowing cause the death of the victim, that petitioner must still be held responsible for the victim's death because she has admitted to committing the crime constituting the aggravating circumstance. This would mandate that a petitioner continue serving a sentence for a capital offense even though she has established that she did not engage in conduct constituting the capital offense. Clearly, the Utah legislature could not have intended such an absurd result. Because "a court should not follow the literal language of a statute if its plain meaning works an absurd result or is 'unreasonably confused, inoperable, or in blatant contravention of the express purpose of a statute,'" *Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242 (quoting *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1992)), the Court rejected the State's argument.

[6] As explained by the Utah Supreme Court, "for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion," *Greener v. Greener*, 212 P.2d 194, 205 (Utah 1949), and "the existence of the [facts at issue is] very highly probable." *Lovett v. Continental Bank & Trust Co.*, 286 P.2d 1065, 1067 (Utah 1955); *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (the "clear-and-convincing standard [means] . . . the ultimate factfinder [has an] abiding conviction that the truth of [the] factual contentions [is] 'highly probable.'" (citing C. McCormick, Law of Evidence § 320, p. 679 (1954))); *Hamlin v. Niedner*, 955 A.2d 251, 254 (Me. 2008) ("Evidence is 'clear and convincing' when it places in the ultimate fact finder an 'abiding conviction' that it is 'highly probable' that the factual contentions of the party with the burden of proof are true."); *Adoption of Zoltan*, 881 N.E.2d 155, 159 (Mass. App. Ct. 2008) ("In order to be clear and convincing, the 'evidence must be sufficient to convey "a high degree of probability" that the proposition is true. . . . The requisite proof must be strong and positive; it must be "full, clear and decisive."'" (quoting *Adoption of Rhona*, 784 N.E.2d 22, 28 (2003))); *State v. Smith*, 749 N.W.2d 88, 94 (Minn. Ct. App. 2008) ("Evidence is clear and convincing when it is highly probable that it is true."); *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595, 602 (Or. 1987) ("To be 'clear and convincing,' evidence must establish that the truth of the facts asserted is 'highly probable.'").

that [the defendant] committed it." *Levine v. Kling*, 123 F.3d 580, 582 (7th Cir. 1997).[7] This distinction between factual and legal innocence cannot be overemphasized in this case because even if the level of doubt raised by Petitioner is so great that no reasonable juror could convict her in a retrial if presented with all of the newly discovered evidence, this still would not establish by clear and convincing evidence that she did not, in fact, engage in the conduct for which she was convicted. At best, such an outcome only demonstrates that no reasonable person would contest the existence of reasonable doubt that Petitioner committed the crime.[8]

This conclusion is bolstered when the Court reads Chapter 9 of Title 78B as a whole. *See Zissi v. State Tax Comm'n*, 842 P.2d 848, 854 (Utah 1992) ("A general rule of statutory construction is that a statute should be construed as a comprehensive whole."). First, under Part 1, a petitioner is entitled to relief if she can show that newly discovered material evidence, when "viewed with all the other evidence . . . , demonstrates that ***no reasonable trier of fact could have found the petitioner guilty of the offense*** or subject to the sentence received." Utah Code Ann. § 78B-9-104(1)(e)(iv) (emphasis added).

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[7] Further support for this proposition is found in the following cases: *Shaw v. Department of Admin.*, 861 P.2d 566, 570 (Alaska 1993) ("We make a distinction in this case between the 'actual' guilt or innocence of a defendant and the 'legal' guilt or innocence of a defendant. 'Legal' guilt or innocence is that determination made by the trier of fact in a criminal trial. Thus a defendant found 'legally' guilty has been found guilty beyond a reasonable doubt by a jury of his peers in a criminal adjudication."); *Moore v. Owens*, 698 N.E.2d 707, 709 (Ill. App. Ct. 1998) ("We do not believe that even if a criminal defendant is acquitted on retrial, that alone will suffice as proof of innocence, although it may be evidence for a fact-finder to consider."); *Glenn v. Aiken*, 569 N.E.2d 783, 789 (Mass. 1991) (Liacos, C.J., concurring) ("A criminal trial is an adjudication of a defendant's legal guilt. As a result, a jury verdict does not address necessarily the issue of a defendant's actual guilt.").

[8] Consider, for example, cases where evidence conclusively establishes that the defendant committed the crime for which she was tried and convicted, but an appellate court on review vacates the conviction on the basis that the evidence supporting the conviction was unconstitutionally obtained and should have been suppressed. All may agree that, without the evidence, no reasonable juror could find the defendant guilty beyond a reasonable doubt, but this would not mean that the defendant did not engage in the conduct for which she was originally tried and convicted. Again, as explained in the body of the Court's memorandum decision, had the Legislature wanted to define factual innocence by reference to reasonable doubt, as the federal courts have done, it could easily have done so. The fact that the Legislature did not do so suggests that the "no reasonable jury" or "no reasonable trier of fact" standard is not the correct standard for determining factual innocence.

In contrast, under Part 4, Petitioner is entitled to relief if she can show that the newly discovered material evidence, when viewed with all the other evidence, demonstrates that Petitioner "***did not . . . engage in the conduct for which [she] was convicted.***" Utah Code Ann. § 78B-9-401.5(2)(a) (emphasis added). Had the Legislature intended the legal standard to be the same under both Parts 1 and 4, it certainly had the language readily available in Part 1 to import into Part 4, the factual innocence statute. The fact that the Legislature elected not to do so strongly suggests to this Court that the "no reasonable jury" or "no reasonable trier of fact" standard is not the correct standard for determining factual innocence.

Second, under Part 4, if a petitioner establishes that she is factually innocent, the trial court must order that her conviction "be vacated with prejudice." Utah Code Ann. § 78B-9-404(4)(a)(i). Under Part 1, however, if a petitioner establishes that, based upon newly discovered evidence, no reasonable trier of fact could have found her guilty of the offense for which she was convicted, then the trial court must "vacate the original conviction . . . and order a new trial." Utah Code Ann. § 78B-9-108(1)(b). Clearly, if factual innocence means that no reasonable trier of fact could have found the petitioner guilty beyond a reasonable doubt, then it would be inconsistent, on the one hand, to vacate the conviction but order a new trial under Part 1 and, on the other hand, vacate the conviction with prejudice under Part 4. This inconsistency provides yet another basis for the Court's conclusion that the "no reasonable jury" or "no reasonable trier of fact" standard is not the correct standard for determining factual innocence.

Accordingly, based upon a careful reading of the factual innocence statute, as well as the entire PCRA, it is the Court's conclusion, as a matter of law, that factual innocence is only established if Petitioner affirmatively demonstrates by clear and convincing evidence that she did not, in fact, commit the homicide. Therefore, while demonstrating that no reasonable jury could

have found her guilty beyond a reasonable doubt had the jury been presented with all of the newly discovered evidence may warrant relief in certain settings, it is not the same relief available to Petitioner under the factual innocence statute. Stated differently, raising doubt as to her underlying conviction, even strong doubt, is not the legal equivalent under the factual innocence statute of establishing that she did not, in fact, cause Lael Brown's death.

2. Pleading Requirements and Meaning of "Newly Discovered Material Evidence"

Among the various pleading requirements in Part 4 of the PCRA, subsection (3)(a) of section 78B-9-402 requires a petitioner to include in her petition an averment that is remarkably similar to the definition of "newly discovered material evidence" under Part 1. This does not mean, however, that the definitions of "newly discovered material evidence" in both Parts 1 and 4 are the same. Under Part 1, "newly discovered material evidence" is defined in terms of *what petitioner and her counsel knew or could have discovered* through the exercise of reasonable diligence. Under Part 4, on the other hand, "newly discovered material evidence" is defined only in terms of *what was available to the petitioner*. Significantly, evidence could be known to a petitioner, but not available to her. For example, suppose a defendant (now petitioner) was aware of or knew about a material witness who could provide relevant testimony in her murder case, but the witness was in a coma during the time of trial. Testimony from this witness would not constitute newly discovered evidence under Part 1 because the defendant-petitioner was aware of the testimony when she was tried for her offense. The testimony would, however, be newly discovered evidence under Part 4 because, while known, the evidence was not available or accessible to her. In the Court's view, whether evidence is known or not known to a petitioner or whether it could have been discovered through the exercise of reasonable diligence is not

determinative of whether the evidence averred in the factual innocence petition or presented at the evidentiary hearing is newly discovered.

Importantly, this view that the definitions of "newly discovered material evidence" under Parts 1 and 4 are not the same does not render superfluous the averment required under subsection (3)(a). The averment in subsection (3)(a) creates a separate, independent requirement that the petition must meet apart from the definition of "newly discovered material evidence." In order to understand the interplay between the definition of "newly discovered material evidence" identified in subsection (3) of section 78B-9-401.5 and the averment required in subsection (3)(a), the Court will walk through its interpretation of the petition requirements found in subsections (2)(a) and (3)(a) of section 78B-9-402.

Section 78B-9-402 outlines the requirements a petitioner must satisfy in order to have the petition granted by the reviewing court. Subsection (2)(a) states that a petition for the determination of factual innocence must contain, among other things, an averment that "newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent." Utah Code Ann. § 78B-9-402(2)(a)(i). When deciding whether a petition meets this requirement, the reviewing court must apply the definition of "newly discovered material evidence" outlined in section 78B-9-401.5(3). Significantly, this definition contains a strict timeframe of unavailability which extends from the time of "trial [to] . . . the resolution on the merits by the trial court of any motion to withdraw a guilty plea or motion for new trial," which is usually 10 days after sentencing.

Now, consider again the example above of a material witness in a murder case who is in a coma during the time of trial. The defendant-petitioner is tried, convicted, and sentenced without the witness' testimony. Suppose 11 days after the defendant-petitioner is sentenced, the witness

wakes up from the coma. As explained above, the witness is still "newly discovered material evidence" as defined by the statute because the witness was unavailable to the defendant-petitioner during the time of trial until 10 days after sentencing. It is immaterial at this juncture that the witness was known about or that the witness became fully available to testify on day 11 after the defendant-petitioner was sentenced. Thus, if a reviewing court finds, among other things, that the witness' testimony, if credible, establishes that the petitioner is factually innocent, then the requirements under subsection (2)(a) are met. If not, the reviewing court must dismiss the petition without prejudice. *See* Utah Code Ann. § 78B-9-402(3)(b).

Having found that the petitioner satisfies subsection (2)(a), the reviewing court must then make another independent determination of whether the requirements under subsection (3)(a) are met as well. Subsection (3)(a) requires the petitioner to include in the petition the following averment:

> [N]either the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence . . . ."

Again, the subsection articulates a timeframe for knowledge of the evidence by the petitioner or petitioner's counsel. However, this timeframe—unlike the definition for "newly discovered material evidence"—extends from the time of trial until the time of any previous post-conviction motion or petition. If the petitioner is unable to make this averment in the petition, regardless of whether the evidence being averred is newly discovered or not, then the reviewing court may dismiss the petition. Even so, subsection (3)(b) contains a waiver provision that allows the reviewing court, based upon the strength of the petition and in the interest of justice, to waive the requirements of subsection (3)(a). The waiver provision does not, however, extend to the

definition of "newly discovered material evidence" and whether the evidence was not available. It also does not extend to waive the requirements of subsection (2)(a).

In the example above, the witness who was in a coma during the time of trial until day 11 after the defendant-petitioner was sentenced meets the requirements for newly discovered material evidence and the requirements of subsection (2)(a). However, the witness does not meet the requirements of subsection (3)(a) because the witness was known about during the time of trial. The reviewing court then has the option to waive the requirements of subsection (3)(a) based upon the strength of the witness' testimony in establishing the petitioner's factual innocence. If, however, the petitioner has known about the evidence for a significant amount of time without bringing a claim of factual innocence, then the reviewing court may decide that it is not in the interest of justice to waive subsection (3)(a). Thus, subsection (3)(a) is a diligence provision that is present to encourage petitioners to bring their claims of factual innocence in a timely manner or risk having the petition dismissed. It is not linked to the definition of "newly discovered material evidence" as defined in Part 4.

3. Evidentiary Basis

Section 78B-9-404, which addresses the hearing on the petition, places no restrictions on the type of evidence the parties may present. Because of the broad language in the section, the Court concludes that all relevant evidence may be presented at the hearing. This includes the newly discovered evidence averred in the petition and any evidence previously presented at trial or in a prior post-conviction proceeding. Furthermore, evidence may be presented that, while not newly discovered, was not presented in any prior proceeding because of tactical decisions,

ineffective assistance of counsel,[9] or other reasons.[10] Finally, the statute explicitly states that the Court may consider evidence that is hearsay in nature and evidence that was suppressed or would have been suppressed at trial. *See* Utah Code Ann. § 78B-9-404(2)-(3).

In determining whether Petitioner is factually innocent, the factual innocence statute states that the Court "shall consider, in addition to the evidence presented at the hearing [on the petition], the record of the original criminal case and at any postconviction proceedings in the case." Utah Code Ann. § 78B-9-404(3). While the statute is clear about what evidence the Court must *consider* in determining Petitioner's factual innocence, it does not expressly indicate what the evidentiary *basis* must be for a finding of factual innocence. That is, the statute does not give the Court definitive direction on whether a finding of factual innocence (1) must be based exclusively on newly discovered evidence, (2) may be based exclusively on non-newly discovered evidence presented at the hearing, or (3) may be based upon a combination of newly discovered evidence and non-newly discovered evidence.

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[9] It may be unusual for evidence that was not presented at trial for tactical reasons to be relevant to a determination of factual innocence. Nevertheless, it is certainly possible that evidence counsel believed at the time of trial would not be helpful may be viewed differently in light of the newly discovered evidence. In addition, evidence that was not presented at trial because trial counsel was ineffective would ordinarily be raised and presented in a petition for post-conviction relief filed under Part 1 of the PCRA and, therefore, may be presented at the hearing on the petition for determination of factual innocence. It is possible, however, that a petition for determination of factual innocence could be raised prior to the filing of a petition for post-conviction relief or the petitioner may have missed her opportunity under the PCRA's statute of limitations to raise a petition for post-conviction relief. There is no reason to believe that evidence the petitioner could have raised in a post-conviction petition had such a petition been filed, should be excluded from the hearing on the petition for determination of factual innocence if it is relevant to determining factual innocence.

[10] The presentation of such evidence is almost inevitable at this type of proceeding. One example is the testimony of a witness who testified at the original trial and is called to testify again at the hearing. Unless the witness gives the same testimony, verbatim, that he gave in the original trial, at least some part of his testimony will be neither "old evidence" nor "newly discovered evidence." Further, the witness may be asked to answer questions that he was not asked at the original trial. Clearly, the Court should not be precluded from considering such testimony simply because it does not conform exactly to the testimony given at the original trial. Another example of such evidence would be evidence that was available to a petitioner at the original trial, but was not presented because it only became relevant in light of the newly discovered evidence. Again, the Court should not be precluded from considering such evidence that aids a petitioner's presentation of factual innocence simply because it is not "newly discovered."

Thus, the question before the Court is one of statutory interpretation, the principles of which the Utah Supreme Court has well-defined:

> Our goal when confronted with questions of statutory interpretation is to evince the true intent and purpose of the Legislature. . . . It is axiomatic that the best evidence of legislative intent is the plain language of the statute itself. . . . But our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a *harmonious whole*. Moreover, the purpose of the statute has an influence on the plain meaning of a statute.

Anderson v Bell, 2010 UT 47, ¶ 9, 234 P.3d 1147 (alteration in the original) (internal citations and quotation marks omitted). Furthermore,

> Our duty to give effect to the plain meaning of a statute . . . should give way if doing so would work a result so absurd that the legislature could not have intended it . . . . Where a statute's plain language creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result. To avoid an absurd result, we endeavor to discover the underlying legislative intent and interpret the statute accordingly.

State v. Jeffries, 2009 UT 5, ¶ 8, 201 P.3d 1004 (internal citations omitted).

The non-restrictive, plain language of section 78B-9-404 suggests that a finding of factual innocence need not be based upon newly discovered evidence. Instead, the factual innocence statute mandates that the Court must vacate a petitioner's conviction "[i]f the court, *after considering all the evidence*, determines by clear and convincing evidence that the petitioner . . . is factually innocent." Utah Code Ann. § 78B-9-404(4) (emphasis added). Even though a strict reading of the plain language of the statute allows a broad consideration of any evidence, the Court finds that this reading could lead to at least three unreasonable, if not absurd or inoperable, results.

First, if the Court's determination can be based upon any evidence, then it is possible that a court could base its determination solely upon the record of the original

trial. This runs afoul of the pleading requirements found in section 78B-9-402(9)(c), which precludes petitions that "merely relitigat[e] facts, issues, or evidence presented in a previous proceeding." Moreover, this broad reading theoretically allows a judge to substitute his or her view of the original evidence for that of a jury's—a substitution this Court refuses to make.

Second, if the Court's determination can be based upon any evidence, then it is possible that a court could base its determination solely upon evidence that was available to the petitioner at trial, but was not presented for tactical reasons or because of ineffective assistance of counsel. While basing the Court's determination on this evidence presents no danger of substituting a judge's judgment for a jury's, a determination based solely upon this evidence encroaches upon Part 1 of the PCRA, which allows a petitioner to receive a new trial because of ineffective assistance of counsel. In essence, the evidentiary bases for the two petitions would be identical, but the results to the petitioner would be vastly different. Under Part 1 of the PCRA, a petitioner would only receive a new trial. Using the same evidence under Part 4, a petitioner's conviction would be vacated and she would be monetarily compensated. Thus, a petitioner could be dilatory under Part 1 and not bring her claim within the required statute of limitations, but be rewarded for her lack of diligence under Part 4, which has no statute of limitations.

Finally, a non-restrictive reading of the language of section 78B-9-404 seems to undermine the pleading requirements in section 78B-9-402. Although section 78B-9-404, which governs the hearing on the petition, nowhere uses the term "newly discovered material evidence," section 78B-9-402, which governs the pleadings, uses the term

repeatedly. In the pleadings, a petitioner is required to aver that "*newly discovered material evidence* exists that, if credible, establishes that the petitioner is factually innocent . . . ." and that "viewed with all the other evidence, the *newly discovered evidence* demonstrates that the petitioner is factually innocent." *Id.* (emphasis added). Furthermore, the statute requires the reviewing judge to find that there is a "bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted." Utah Code Ann. § 78B-9-402(9)(c). The statute defines a "bona fide and compelling issue of factual innocence" as meaning that "the *newly discovered material evidence* presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner." Utah Code Ann. § 78B-9-401.5(1) (emphasis added).

Thus, section 78B-9-402 specifically mandates newly discovered material evidence as the expected evidentiary basis for a finding of factual innocence during the pleading stage of the claim process. If a petitioner does not satisfy this basis, the judge must dismiss the petition without a hearing. *See* Utah Code Ann. § 78B-9-402(3)(b). It would be peculiar if a similar evidentiary basis did not apply during the hearing stage. If the Legislature is not concerned about whether "newly discovered material evidence" contributes to the determination of factual innocence at the hearing, then in the Court's view it is pointless and unduly harsh to impose such a strong averment requirement in the petition. Therefore, after reading the factual innocence statute as a whole, the Court is not convinced that the pleading requirements are mere procedural hurdles; instead, the Court is convinced that the pleading requirements create an expectation that newly discovered material evidence will be presented at the hearing and will have at least some bearing on the Court's determination of factual innocence.

The only question left for the Court is whether the determination of factual innocence must be based *exclusively* upon newly discovered material evidence or whether it can be based upon a *combination* of the newly discovered evidence plus any other relevant evidence. The Court recognizes that the primary purpose behind bringing other evidence to the hearing is either to bolster or impugn the credibility of the newly discovered evidence. In this evaluation, however, it is possible that the newly discovered evidence alone does not clearly demonstrate that the petitioner is factually innocent, but instead the newly discovered evidence together with all the other evidence does rise to the required clear and convincing standard for demonstrating factual innocence. While newly discovered evidence is required to be the sole basis for factual innocence at the pleading stage of the petition, the Court finds that such a strict requirement at the hearing stage would be adverse to the overall intent and purpose of the statute.

As stated above, the core purpose of the factual innocence statute is to "provide justice . . . for individuals who have been found factually innocent of a crime for which they were previously convicted and incarcerated." *Miller v. State*, 2010 UT App 25 at ¶ 7. Furthermore, the legislative history clearly highlights the mischief the statute was created to remedy. During the floor debates, Senator Greg Bell stated that the statute was enacted out of "concern for those who might be trampled upon in the grinding process of the law" and to "compensate[e] folks who have been dealt a very heavy and unjust blow." *Id.* (citing Recording of Utah Senate Floor Debates, 58th Leg., Gen. Sess. (Jan. 23, 2008) (statement of Sen. Bell on Senate Bill 016), *available at* http://le.utah.gov/asp/audio/index.asp). Clearly, the Legislature's primary concern is the factual innocence of the petitioner—not the status of the evidence that proves factual innocence. It would be

unjust to deny these petitioners relief who can prove by clear and convincing evidence that they are, in fact, innocent simply because they cannot prove their factual innocence based *solely* upon newly discovered evidence. Instead, the Court finds that it may base its determination of factual innocence either upon newly discovered evidence alone or a combination of evidence—as long as the newly discovered material evidence provides at least part of that basis. By considering "all of the evidence," the Court effectuates not only the plain language of the statute, but also the overall intent and purpose of the Legislature. *See* Utah Code Ann. § 78B-9-404(4)

C. Consideration of the Evidence

1. Evidence Presented on January 18–24, 2011

It is clear that Petitioner has relied upon an incorrect legal standard in presenting and arguing her case. This error obscured her view of what evidence was important to establishing factual innocence and dramatically undermined her ability to demonstrate by clear and convincing evidence that she did not, in fact, cause the death of Lael Brown. It is fair to say that most of the new evidence presented by her at the evidentiary hearing convened on January 18–24, 2011, when viewed with the facts of the underlying criminal case, at best raises doubts about the State's circumstantial case against her, but does not establish that she did not engage in the conduct for which she was convicted. Furthermore, even if the legal standard Petitioner relied upon were the correct standard, she still would not have prevailed on her claim of factual innocence based upon the evidence presented at the evidentiary hearing. While the new evidence may undermine the State's case in significant respects and would have, in all likelihood, made it more difficult for the State to obtain a conviction had it been presented to the jury, it is the Court's view that reasonable jurors still could have differed on what the old and

new facts established and whether the prosecution could have proven its case beyond a reasonable doubt.

First, Petitioner presented credible evidence challenging the State's theory that she was the only person who had a motive to kill Lael. This included evidence that Lael never discovered Petitioner's forgeries prior to his death; that numerous bank statements, and not simply the October bank statement, were missing from his home; that Petitioner relied upon Lael for money through loans and employment and, therefore, it would have been contrary to her financial well-being to kill Lael; that many people knew Lael kept large amounts of cash in his home; and that Sheen was angry with Lael for having evicted him. Importantly, however, Petitioner acknowledged that she did commit the forgeries as alleged by the State at trial. While the new evidence may raise doubts that she had a motive to kill Lael or, at a minimum, that it is at least questionable whether she was the only person who had such a motive, it does not establish, either on its own or when viewed with all the other evidence, that she did not, in fact, cause Lael's death. Clearly, had this evidence been presented at Petitioner's original trial, reasonable minds still could have differed on whether Petitioner had a motive to commit the murder.

Second, Petitioner also presented credible new evidence challenging the State's theory that she was the only person who had access to Lael's home. This included evidence that she was not the only person with a key to Lael's house; that the front and back doors to Lael's house were not secure; and that the bathroom window could be opened. Again, at best this evidence raises doubts about the State's theory, but it does not affirmatively establish, either on its own or when viewed with all the other evidence, that she was not the one who entered Lael's home on the morning of November 6th or that she did not, in fact, cause Lael's death.

Third, Petitioner provided the Court with new evidence that someone other than Petitioner, namely Sheen, was the likely perpetrator of the homicide and, therefore, that the State's theory that she was the only possible person who could have committed the murder was erroneous. Petitioner presented evidence that LPD failed to investigate Sheen even though the police knew he was a possible suspect; that the overall investigation was less than adequate and that police failed to collect or analyze important evidence at the crime scene; and that Sheen may have been in possession of a gun similar to the one used to kill Lael, may have been uncharacteristically carrying a large sum of cash sometime after Lael's murder, may have been angry at Lael for having evicted him, and may have been driving a car similar to one seen at Lael's house on the day of the murder. Although this evidence certainly would have assisted Petitioner in undermining the State's circumstantial case against her, at most it merely creates a circumstantial case against Sheen. Reasonable minds still could differ on which circumstantial case to believe. This evidence, therefore, does not establish, either on its own or when viewed with all the other evidence, that no reasonable juror could have convicted Petitioner had this evidence been presented at the original trial or, more importantly, that Petitioner did not, in fact, cause Lael's death.

Finally, Petitioner also sought to provide new evidence challenging the time of death the State established at trial. The State argued to the jury that Lael was murdered at approximately 7:00 a.m. on Saturday, November 6, 1993, a time when Petitioner did not have a clear alibi. Prosecutors established the time of Lael's death first through the testimony of Dr. Grey, the medical examiner, who testified that the post-mortem interval,[11] based upon the physical

[11] Post-mortem interval is the time that has elapsed since a person has died.

evidence,[12] was 36 hours from the time the autopsy was performed at 9:00 a.m. on Monday, November 8th. In addition, Dr. Grey also testified that, given the condition of the body at the time it was discovered, it was highly unlikely that Lael was killed after 3:00 a.m. Sunday morning. Thus, based upon the physical evidence, Lael's murder likely occurred sometime around 9:00 p.m. on Saturday, November 6th, and no later than 3:00 a.m. on Sunday, November 7th.

However, Dr. Grey also testified that "association factors," such as Lael's routines, his appointments, and the last time he was seen alive, could justify expanding the post-mortem interval. With respect to these association factors, the State called witnesses at trial who testified that although Lael's normal routine was to have coffee at Angie's Restaurant and work around his home on Saturday mornings, he was not seen at any time on Saturday. In addition, Lael normally spoke to his former spouse on Saturday mornings about business matters, but Lael never answered his telephone, although witnesses heard the phone ringing. Moreover, on Friday evening Lael made an appointment to meet with a tenant to do some plumbing repairs on Saturday morning, but he failed to keep his appointment. Finally, testimony from witnesses at trial established that Lael was last seen alive at 5:00 p.m. on Friday, November 5th. When all of the physical evidence and association factors are coupled with Nyman's testimony that she heard what she believed to be gunshots coming from the direction of Lael's house at 7:00 a.m. on November 6th, the State argued that Lael was murdered at approximately 7:00 a.m. on Saturday morning.

In an effort to cast doubt on the State's time of death argument, Petitioner presented

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[12] As explained by Dr. Grey, physical evidence relevant to determining the post-mortem interval includes body cooling, stiffening of the limbs (rigor mortis), settling of the blood (liver mortis), and decomposition.

newly discovered evidence at the evidentiary hearing that Nyman was unsure of the day on which she heard gunshots. Despite her trial testimony, which included a statement that she was nearly certain she heard gunshots on Saturday morning, at the evidentiary hearing she testified that she was not sure when she heard gunshots, but that it was on the same day there was police activity at Lael's house, which would have been on Sunday, November 7th. Interestingly, Nyman also apparently told Officer Collins that she heard gunshots Saturday *evening*. In any event, based upon the uncontroverted testimony of Dr. Grey and Officer Andrews concerning the physical condition of Lael's body when it was discovered Sunday morning, it is simply not possible that if Nyman heard gunshots at 7:00 a.m. on Sunday that those gunshots were in any way connected to Lael's murder. The most that can be concluded in Petitioner's favor from Nyman's current and prior testimony is that it is unclear whether she heard gunshots at 7:00 a.m. on Saturday, November 6th. The newly discovered evidence from Nyman does not establish, either on its own or when viewed with all the other evidence presented at the hearing, that no reasonable juror could have convicted Petitioner had her evidentiary hearing testimony been presented at the original trial or that Petitioner did not, in fact, cause Lael's death.

While all of the foregoing evidence certainly raises doubts about the State's case against Petitioner, it clearly does not establish that Petitioner did not, in fact, cause the death of Lael Brown at 7:00 a.m. on Saturday, November 6th. Therefore, it also does not establish that she is factually innocent of the crime for which she was convicted.[13]

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[13] Given the Court's conclusion with respect to the proper legal standard that applies and the Court's assessment of the evidence presented by Petitioner at the January 18-24, 2011, evidentiary hearing, one may question whether the original petition for determination of factual innocence should have been granted. In finding that a bona fide issue of factual innocence existed, Judge Allen's ruling specifically stated that "Petitioner has pled factual innocence, and alleged that newly discovered evidence establishes such. Petitioner's new evidence, if taken as true, *creates substantial doubts as to the State's original case*." Mem. Decision, August 3, 2009, at 10 (emphasis

2. Evidence Presented on March 7, 2011

a) Background

On January 26, 2011, just two days after the presentation of evidence by Petitioner, the Court convened a telephone conference with counsel for the purpose of raising a concern with respect to two items of hearsay evidence admitted as Exhibit 82 and Exhibit 34. The first item of evidence was a case information sheet prepared by Detective Ridler that memorialized his interview with a man by the name of Delwin Hall. According to Detective Ridler, Hall stated that he was sure he saw Lael at Angie's Restaurant on Saturday, November 6th, at 2:30 p.m. The second item of evidence was another case information sheet prepared by Dennis Simonson that memorialized his interview with Dexter Taylor who stated that he heard, third hand, that a secretary at Cache Valley Insurance had observed Lael walking with an associate of Michael Wayne Philips on November 6th. The Court indicated to counsel its belief that these two items of evidence were critical pieces of information in the case.[14] Moreover, the Court also stated that

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added). However, as explained in the body of the memorandum decision, even when newly discovered evidence exists, if it only raises doubts about the State's original case against Petitioner, it does not demonstrate that she did not engage in the conduct for which she was convicted and, therefore, that she is factually innocent.

Nevertheless, it is important to point out that unlike the argument raised by the State at the conclusion of the evidentiary hearing, in its motion to dismiss the petition before Judge Allen the State only argued that none of the evidence raised in the petition constituted newly discovered evidence. The State never challenged the legal standard relied upon by Petitioner to claim that she was factually innocent. This is significant because Judge Allen could not have been expected to review the petition and make the required findings under section 78B-9-402 based upon a legal standard other than the one asserted by Petitioner and, more importantly, uncontested by the State.

In addition, it is noteworthy that at the motion hearing convened on January 14, 2011, although the State argued that it disagreed with Judge Allen's conclusion that a bona fide issue of factual innocence existed, the State also acknowledged that Judge Allen made the threshold finding required by section 78B-9-402 and that, in light of his decision, Petitioner was *entitled* to a hearing on the merits of her factual innocence claim. The State never contested whether the evidentiary hearing should go forward or whether Petitioner should be allowed to present her evidence. Rather, the State only argued that it must be permitted to challenge, at the conclusion of the presentation of evidence, whether Petitioner was able to demonstrate that the evidence in her possession was, in fact, newly discovered evidence that supported a finding of factual innocence.

[14] The Court first raised its concerns about Exhibit 82 and Exhibit 34 and inquired whether any follow-up had been done or whether any additional information was available in an off-the-record discussion with counsel in chambers immediately prior to the presentation of closing arguments on January 24, 2011. The State responded that

it would be willing to reopen the case in order to consider additional evidence if the parties were inclined to do any additional investigation or follow-up that might assist the Court in evaluating the credibility and weight of these two pieces of evidence. Counsel for Petitioner expressed a desire to do additional investigation, which was granted by the Court. At a subsequent telephone conference convened on February 14, 2011, Petitioner's counsel indicated that they had located Hall, that they had also located another relevant witness, Terry Carlsen,[15] and that they were both prepared to testify. The State informed the Court that it would call Mike Brown, Lael's son, to testify as a rebuttal witness to Carlsen.

At the March 7, 2011, evidentiary hearing, Hall, who was a friend of Lael's, testified that he provided Detective Ridler with a statement concerning the last time he saw Lael alive. The case information sheet created by Detective Ridler states, verbatim, that

> Del is a friend/coffee drinking buddy of Lael's from Angie's. Dell related that he saw Lael Friday night at Angies and also Saturday, 11-6-93 at aprox. 1430 hours in Angies. Dell is sure of the time, because he was stopping in Angie's before going to work at albertson at 1500 hours.

According to Hall's statement, he stopped in Angie's Restaurant on his way to work at 2:30 p.m.

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the evidence was not newly discovered and, therefore, no follow-up was necessary. Petitioner responded that Exhibits 82 and 34 were simply additional illustrations of how the police failed to properly investigate the case. The Court also asked counsel how it should evaluate these exhibits without additional information. Neither the State nor Petitioner provided the Court with helpful guidance as to the weight and credibility it should attribute to these exhibits.

[15]During the telephone conference, Petitioner's counsel told the Court about Terry Carlsen for the first time and disclosed that Carlsen had seen Lael at Angie's on the evening of Saturday, November 6th. Counsel stated that they had "actually met [Carlsen] through Del Hall and trying to find where Del Hall was." Based upon this representation, the Court believed Carlsen to be a previously unknown witness with pertinent information regarding Lael's time of death, and the Court allowed Carlsen to testify at the hearing on March 7th. Carlsen's testimony at the hearing, however, revealed that he was not a previously unknown witness. Carlsen testified on cross-examination that he had first spoken to one of Petitioner's attorneys in 2008 about seeing Lael at Angie's. The Court is concerned that the failure to disclose Petitioner's prior knowledge of Carlsen was not simply an oversight, but a material omission that misled the Court. Moreover, the Court is perplexed as to why such an important piece of evidence about which RMIC was aware was not included in the original petition especially because Carlsen's testimony is newly discovered material evidence as defined by the factual innocence statute which, if credible, would establish Petitioner's factual innocence.

on Saturday, November 6th, and saw Lael Brown. While Hall does not now have an independent recollection of what he told Detective Ridler, he testified at the evidentiary hearing that at the time he gave his statement he was "quite sure" he saw Lael on Saturday. Hall also stated twice that he saw Lael before 3:00 p.m. Hall described going into Angie's Restaurant and seeing Lael sitting at the counter near the cash register with another man. He recognized Lael because he saw his face, but he did not recognize the man with whom Lael was sitting. Not wanting to interrupt them, Hall walked to the other end of the counter without saying hello. When asked whether he saw Lael leave Angie's, Hall stated that Lael and the other man left before Hall was finished drinking his coffee.

Next, Carlsen, who was also a good friend of Lael's, testified that he saw Lael and his son Mike in Angie's Restaurant between 7:15 and 7:45 p.m. on Saturday, November 6th. Carlsen testified that he was sitting at the back counter at Angie's when Lael and Mike walked in and sat at the end of the counter. He could see that Lael and Mike were having a conversation, but he could not hear what was being said. Carlsen testified that he is certain about the day and time he saw Lael at Angie's. According to Carlsen, on Sunday, November 7th a friend of his, Keith Eames, came by the service station where Carlsen worked and told him that the police were at Lael's house and that Lael had been murdered. Carlsen testified that he remembers being shocked and thinking to himself that he had just seen Lael alive the night before.

The State, however, argued that both Hall and Carlsen were mistaken about seeing Lael alive on Saturday. In its cross-examination of Hall, the State referred to several case information sheets of interviews with waitresses from Angie's Restaurant, all of whom stated that they either did not think Lael was at Angie's on Saturday or that they did not remember or did not recall seeing Lael at Angie's on Saturday. After Hall and Carlsen were made aware of the content of

these police case notes, they were asked whether they had been mistaken about when they had seen Lael alive. Both reaffirmed that they saw at Angie's on Saturday.

In addition, the State also elicited testimony from Carlsen that the State argues calls into question the believability of his testimony. Carlsen testified that he was friends with Petitioner at the time of the homicide. After Petitioner was arrested, Carlsen conceded that Petitioner called him from jail on a few occasions. Moreover, since Petitioner has been in prison, Carlsen has maintained regular contact with Petitioner's aunt, Judy Bodrero.

Finally, the State called Lael's son Mike as a rebuttal witness. Mike testified that, contrary to Carlsen's testimony, he was not with Lael at any time on Saturday, November 6th. The last time he saw his father was on Monday, November 1st. He recalled that this was the day because, although he lived in Box Elder County at the time, he has a check that he wrote to Shopko in Logan on Monday of the week Lael was killed and it was his recollection that he did not come back to Logan any other time that week.

b) Terry Carlsen's Testimony

Carlsen's testimony is newly discovered evidence as defined by the factual innocence statute because, based upon the evidence presented, he was unavailable to Petitioner at trial and during the resolution of any post-trial motion. Carlsen testified that the police never spoke with him about Petitioner's case and no evidence was presented establishing that he personally spoke with Petitioner or her counsel about the information he possessed. Since he was unavailable, Carlsen's testimony constitutes newly discovered evidence.

The central concerns with respect to Carlsen's testimony are whether he is accurate and credible. Carlsen testified that while he was sitting at the back counter, he saw Lael walk into Angie's with his son Mike. Carlsen specifically stated that he observed the two of them having a

conversation not more than 20 feet from where he was sitting. These circumstances establish that when Carlsen was in Angie's he was in a position to actually see Lael. In addition, there is little question that if Lael entered Angie's Restaurant around 7:15 p.m. on Saturday, Carlsen would have recognized Lael. Carlsen testified that he was good friends with Lael and that in 1993 he would sometimes see Lael twice a day at Angie's. In addition, he and Lael would occasionally drive together to Franklin, Idaho, on Tuesdays or Wednesdays in order to purchase lottery tickets. They would then get together on Wednesday evening around 8:00 p.m. to watch the lottery results. Certainly, if Lael was in Angie's on Saturday evening, Carlsen would not have mistaken someone else for Lael.

Just as important, however, is whether Carlsen accurately testified that he saw Lael at Angie's the evening of Saturday, November 6th. Carlsen stated that he was certain about the day. Mike Brown, however, was just as emphatic that he was not in Angie's on Saturday evening with his father. Mike initially testified that he last saw his father alive on Monday night the week Lael was killed, which would have been November 1st. He indicated that he remembers it was Monday because he has a check he wrote to the Shopko in Logan on that day, and he has no recollection of returning to Cache County any other time that week. On cross-examination, however, Mike admitted that he could have last seen his father on Tuesday, but that it was most likely Monday. Then, on re-direct, he testified that he could have seen his father as late as Wednesday. When queried on cross-examination about whether he could have seen his father as late as Thursday, Mike testified that he definitely did not see Lael on that day.

However, counsel for Petitioner pointed out that at the preliminary hearing Mike testified that he and Lael drove together to Angie's Restaurant for coffee on Thursday evening. When confronted with this discrepancy, Mike testified that he did not see Lael on Thursday, that he

does not recall testifying to those facts at the preliminary hearing, and that if he did testify that way at the preliminary hearing, he does not know why he would have done so. Importantly, Mike also acknowledged that during the 1993 to 1994 timeframe he could have had problems with his memory, likely as a result of alcohol abuse. Based upon Mike's inconsistent recollection of when he last saw Lael alive and his apparent memory problems, the Court finds that the mere fact that Mike remembers events differently from Carlsen is not, in itself, conclusive with respect to the accuracy of Carlsen's testimony concerning the day Carlsen last saw Lael alive.

When Carlsen was cross-examined by the State, he was presented with information from one of the waitresses at Angie's, Debbie Keller, that was recorded on a police case information sheet. Keller apparently worked at Angie's on Saturday evenings from 3:00 to 11:00 p.m. According to the case information sheet, she allegedly told police that she did not see Lael Saturday night. She indicated that Lael is always in Angie's around 8:00 p.m. and that the last time she saw him was Thursday, although it may have been Friday evening. Keller was not called to testify at the evidentiary hearing and so the veracity of her statement was never subjected to testing under cross-examination. However, a single waitress stating that she did not see Lael during her shift on Saturday evening has, at best, only marginal value. Not seeing someone has less persuasive effect, in the Court's view, than actually seeing someone because there are a variety of reasons why a person may be present at a location but not noticed. Moreover, the fact that Keller was not sure whether she last saw Lael on Thursday or Friday is at least some evidence that she may not be sure about not seeing Lael on Saturday. It is also noteworthy that another waitress, Holly Crocket, who also worked at Angie's on Saturday evenings, indicated that she believed she saw Lael Saturday night, although she is very unsure.

In any event, it is significant that in response to questioning about Keller's statement that she did not see Lael in Angie's Saturday evening, Carlsen stated that while he would have expected one of the waitress to have seen Lael, if a waitress stated that Lael was not in Angie's Saturday night, then the waitress must be mistaken. Carlsen then provided the reasonable explanation that if Lael was not seen by the waitresses it was because Angie's Restaurant is very busy on Saturday nights and it would not be unusual for a waitress not to take notice of a patron who regularly frequents Angie's. Even the case information sheet concerning Crocket states that Lael is in Angie's all the time and that she does not pay any attention to him. Thus, the Court finds that the mere fact of a single waitress's hearsay statement that she did not see Lael in Angie's on Saturday evening is insufficient to undermine the accuracy of Carlsen's testimony concerning the day on which he last saw Lael alive.

In addition, if true, the circumstances under which Carlsen learned of Lael's death strongly suggest that Carlsen has accurately remembered seeing Lael Saturday evening. According to Carlsen, around 2:00 p.m. on Sunday, November 7th, a friend of his, Keith Eames, came to the service station where Carlsen worked and informed him that the police were at Lael's house and that Lael had been shot the previous night. Carlsen testified that he remembered to thinking to himself that he had seen Lael just the night before and that it shocked him that Lael could be dead. Common experience alone confirms that when a person is informed of a close friend or family member's death in close proximity to when the friend or family member was last seen alive, the shock or trauma of the event often engraves on the person's memory the day, and even the time, when the person last encountered his or her friend or family member.

Furthermore, it is also significant that Carlsen's testimony is consistent with Dr. Grey's

time of death estimate based upon the physical evidence. Dr. Grey testified at trial that the physical findings he observed on Lael's body were most consistent with or most typical of a time of death approximately 36 hours prior to the autopsy, which began at 9:00 a.m. on Monday, November 8th. This testimony strongly suggests that Lael was likely killed around 9:00 p.m. on Saturday, November 6th, and would have been alive during the time Carlsen testified he saw Lael at Angie's. Thus, notwithstanding Mike Brown's testimony to the contrary and the hearsay information about what Keller remembers, the Court is of the opinion, based upon the foregoing evidence, that it is highly probable Carlsen accurately remembered seeing Lael in Angie's Restaurant on Saturday, November 6th.

With respect to Carlsen's credibility, the State pointed out, and Carlsen admitted, that he has previously been convicted of the offense of tampering with a witness. Although the details of Carlsen's offense are not known to the Court, his conviction suggests at least some willingness on Carlsen's part to alter or manipulate evidence. In addition, although Petitioner argued that there is no obvious reason why Carlsen would not testify truthfully about seeing Lael alive in Angie's Restaurant on Saturday evening, his friendship with Petitioner is clearly a circumstance the Court must take into account in determining whether Carlsen testified truthfully. It is contrary to human nature for a witness not to at least want to testify or provide evidence that assists a friend, and the closer or more intimate a friendship the greater the likelihood that the witness will color the truth for the sake of the friendship. Nevertheless, mere friendship alone is insufficient to categorically conclude that a witness is not being truthful. Carlsen testified that he is "good friends" with Petitioner, but there is no indication that they ever had, or have now, a close friendship. While Petitioner apparently contacted and spoke with Carlsen a few times while she was incarcerated after her arrest, no evidence was presented

suggesting that they have communicated with each other since Petitioner was sentenced to prison in 1995. In terms of Carlsen's friendship with Petitioner's aunt, Judy Bodrero, it is unclear how close this friendship is. Carlsen appears to have a closer relationship with Bodrero than with Petitioner. The testimony presented at the evidentiary hearing indicates that Carlsen has maintained regular contact with Bodrero, and at times has spoken with her on a daily basis, since 1995. Again, although mere friendship is insufficient to conclude that a witness is being untruthful, Carlsen's friendship with Petitioner and Bodrero constitutes some evidence that Carlsen may have a motive to fabricate a story about seeing Lael at Angie's on Saturday evening.

Also affecting the credibility of Carlsen's testimony is the fact that he never came forward with the information in his possession until 2008, when he apparently spoke with attorneys for RMIC. Moreover, he never publicly revealed the information in his possession until the evidentiary hearing, over seventeen years after Lael's death. It may be true, of course, that he told Bodrero prior to trial about seeing Lael alive in Angie's on Saturday evening and that he expected her to speak with Petitioner's attorneys about this information, which he testified she told him she did. But no explanation was ever provided as to why Carlsen himself did not go to law enforcement with the information he had. Given Carlsen's friendship with Petitioner and Bodrero, it stretches the imagination to think that he was not aware that the State was prosecuting Petitioner on the theory that Lael was murdered sometime Saturday morning on November 6th. Furthermore, if what Carlsen testified to is true, then after trial, believing as he must have that a "good friend" had been wrongfully convicted, one would have expected Carlsen, at some point within a reasonable time following the conviction, to publicly disclose that he saw Lael alive at a time when the State argued he was dead. The fact that he did not do

so raises a legitimate question concerning the veracity of Carlsen's testimony.

On the other hand, Carlsen's testimony was never internally inconsistent and the manner of his responses did not suggest he was being untruthful. Furthermore, if it was Carlsen's objective to help Petitioner by providing false testimony that would undermine the State's theory concerning time of death, it is peculiar that he would manufacture a story that includes Lael's son Mike. Certainly Carlsen must have known that in testifying that Lael was with Mike on Saturday evening, his story could easily be contradicted simply by Mike denying that he was with his father at any time on November 6th, which is how he testified at the evidentiary hearing. It is all the more unusual given that Carlsen could have easily fabricated a virtually unassailable account simply by saying that he saw Lael at Angie's with an unknown acquaintance. Thus, the nature of Carlsen's account provides some support for the believability of his testimony.

While there are a variety of reasons to question the veracity of Carlsen's testimony, there are also reasons suggesting that he is telling the truth. Carlsen's account is certainly believable. Overall, however, it is the Court's considered view that Carlsen's testimony that he saw Lael alive on Saturday evening at Angie's Restaurant is not sufficiently credible to independently establish by clear and convincing evidence that Lael was alive at a time when the State argued he must have been dead.

c) Delwin Hall's Testimony

Evidence presented at the hearing convened on January 18-24, 2011, indicated that Hall's name was included on a defense witness list at the time of trial. One of Petitioner's trial counsel, Shannon Demler, testified that he had no recollection whatsoever of Hall. Nevertheless, although Petitioner stated that she had limited conversations with her appointed attorneys and that they told her not to worry about the details of the case, she did not carry her burden of

establishing that she was unaware of Hall as a potential witness or that Hall was not available to testify at trial. Thus, Hall's evidentiary hearing testimony does not constitute newly discovered material evidence as defined by the factual innocence statute. Importantly, however, Hall's testimony is evidence that has never previously been presented in any proceeding.

A careful consideration of Hall's testimony and statement to police convinces the Court that it is highly likely Hall was not mistaken when he told Detective Ridler in 1993 that he saw Lael at Angie's Restaurant on Saturday, November 6th. The circumstances described by Hall establish that when he was in Angie's he was in a position to actually see Lael. Hall testified that he was on his way to work when he stopped at Angie's for coffee. Lael was already there and was sitting at the counter conversing with an unidentified man. Hall ordered coffee without saying hello to Lael because he did not want to interrupt Lael's conversation with the other man. While Hall was still drinking his coffee, Lael and the unidentified man left the restaurant. Hall specifically testified at the evidentiary hearing that he saw Lael's face. There is no question, based upon this testimony, that if Lael was in Angie's Restaurant on Saturday when Hall entered, Hall was in a position to see Lael. In addition, Hall would not have mistaken someone else for Lael. Hall testified that he knew and was friends with Lael. His statement to Detective Ridler indicates that he was one of Lael's "coffee-drinking buddies." If Lael was in Angie's on Saturday, Hall would have certainly recognized him sitting at the counter.

The only remaining issue with respect to accuracy is whether Hall was mistaken about the day on which he saw Lael at Angie's Restaurant. Significantly, Hall's statement to Detective Ridler was made on November 10, 1993, at 10:15 a.m., less than 4 days after Hall saw Lael at Angie's. This close proximity in time is crucially important because Hall's recollection about what day he saw Lael would have been fresh in his mind. Moreover, because there were no

intervening weekends to cause confusion, it is highly likely that Hall would not have been mistaken about seeing Lael at Angie's on Saturday afternoon. Furthermore, the fact that Hall stated to Detective Ridler that he saw Lael Friday *night* as well as Saturday *afternoon* also strongly suggests that Hall was not mistaken about seeing Lael on Saturday. In addition, Hall indicated that he was "sure" he saw Lael on Saturday, November 6th, and no evidence was presented suggesting that in 1993 Hall was easily confused about dates or that he had short-term memory problems. Finally, in response to questioning at the evidentiary hearing about his level of certainty concerning what day he saw Lael, Hall testified that he was "quite sure" he saw Lael on Saturday. Clearly, based upon the foregoing evidence, Hall has a high degree of certainty that the day on which he saw Lael at Angie's Restaurant was Saturday, November 6th.

The State vigorously challenged the accuracy of Hall's report to Detective Ridler. According to the State, several waitresses who were working at Angie's on Saturday made statements to law enforcement that they did not see Lael. On the basis of these statements, the State argues that Hall was simply mistaken about the day he saw Lael at Angie's Restaurant.[16] However, a careful examination of the statements made by the waitresses reveals that none of them affirmatively stated that they did not see Lael Saturday afternoon. As noted above, the case information sheets for both Crockett and Keller indicate that they worked at Angie's on Saturdays from 3:00 to 11:00 p.m. and that Lael was always there around 8:00 p.m. Crocket stated that she thought she saw Lael Saturday evening, but she was very unsure. Keller stated that she did not see Lael in Angie's Saturday night. Neither one of these statements, however, is

[16] None of the waitresses were called to testify at the evidentiary hearing and their statements to law enforcement are hearsay. While the Court is permitted to consider hearsay statements under the factual innocence statute, the Court "may also consider that the evidence is hearsay in evaluating its weight and credibility." Utah Code Ann. § 78B-9-404(2)(b).

inconsistent with Hall's statement to Detective Ridler. As Hall firmly pointed out during cross-examination, Crockett and Keller did not begin their shifts until 3:00 p.m. and he saw Lael prior to that time. More importantly, Hall testified that Lael left Angie's before he did. This fact is significant to the Court because Hall told Detective Ridler that he had to be to work by 3:00 p.m.

The case information sheet on Cindy Smith indicates that she worked at Angie's on Saturdays from 7:00 a.m. to 3:00 p.m., but also makes reference to the hours of "8 to 11:00." Whether this notation is indicative of the hours Smith actually worked and whether they actually refer to morning hours rather than evening hours is unclear. In any event, her statement makes no reference at all to whether she did or did not see Lael during her shift, only that she would contact law enforcement if she thought of anything. Her statement is not, therefore, inconsistent with Hall's statement. The case information sheet for Sally Peterson indicates that she worked at Angie's on Saturdays from 6:00 a.m. to 2:00 p.m. She stated that while Lael frequented Angie's like clockwork, she did not think he was in Angie's Saturday *morning*. Clearly, this statement is not inconsistent with Hall's statement that he saw Lael Saturday afternoon. Jenny Kemp's case information sheet indicates that she worked at Angie's on Saturdays from 5:30 a.m. to 2:00 p.m. and that she could not remember seeing Lael on Saturday. Significantly, Kemp statement that she did not remember seeing Lael at Angie's on Saturday is not the same as saying that Lael was not there on Saturday. At best her statement only indicates that she was uncertain. It is possible Lael could have been at Angie's on Saturday, but she simply did not remember seeing him. Thus, Kemp's statement is not necessarily inconsistent with Hall's statement that he is sure Lael was in Angie's Saturday afternoon. Furthermore, if Hall saw Lael at 2:30 p.m., and not 1:00 p.m., Kemp's statement that she did not see Lael on Saturday would not be inconsistent with Hall's statement because Kemp only worked until 2:00 p.m. Finally, the case information sheets

for Kim Churchill and Lori Craig indicate that they worked at Angie's on Saturdays from 10:00 a.m. to 3:00 p.m. and 8:00 a.m. to 3:00 p.m., respectively. Churchill stated that she did not see Lael Saturday *morning*. Likewise, Craig stated that she worked Saturday *morning* and did not think Lael was there. As with the statement from Peterson, these statements from Churchill and Craig are not inconsistent with Hall's assertion that he saw Lael in Angie's Saturday afternoon.

Furthermore, it is significant that Hall's statement is consistent with, and in fact bolstered by, Dr. Grey's time of death estimate based upon the physical evidence. As explained previously, Dr. Grey testified at trial that the physical findings he observed on Lael's body were most consistent with or most typical of a time of death approximately 36 hours prior to the autopsy, which began at 9:00 a.m. on Monday, November 8th. This testimony strongly suggests that Lael was likely killed around 9:00 p.m. on Saturday, November 6th, and would have been alive in the early afternoon when Hall said he saw Lael at Angie's.[17] In light of the foregoing assessment of Hall's evidentiary hearing testimony and his statement to police, as well as Dr. Grey's testimony concerning time of death, the Court finds that Hall was not mistaken when he stated that he saw Lael at Angie's Restaurant during the early afternoon hours on Saturday, November 6th.

With respect to Hall's credibility, no evidence was presented that he would have gained any advantage by fabricating a story in 1993, or that he would gain any advantage now by stating

[17] It is true that the State presented testimony at trial concerning the existence of other facts that could suggest a time of death earlier than 9:00 p.m. on Saturday. But these facts are not *necessarily* inconsistent with Hall's statement. Evidence was presented by the State that Lael's telephone was not answered Saturday morning, that he did not keep a previous appointment to do plumbing work for a tenant Saturday morning, that he never picked up the soup left on the porch by Petitioner, that he was never seen outside working in the yard as was his routine, and that his car was apparently not moved throughout the day. The State's explanation for these facts, and the one apparently believed by the jury, is that Lael was dead. But clearly other plausible explanations, including that Lael was simply not feeling well, could also easily account for these facts. Thus, the existence of these facts is not necessarily inconsistent with Hall's statement to Detective Ridler that he saw Lael alive Saturday afternoon.

that he saw Lael alive during the afternoon hours of Saturday, November 6th. In addition, no evidence was presented that Hall had any connection to the people involved in the case and he testified without contradiction that he was unacquainted with Petitioner at the time of the homicide and that he is unacquainted with her now. Furthermore, there was nothing about the manner in which Hall testified that suggested to the Court he was not being truthful. It is true, of course, that Hall was less than consistent concerning the time of day he saw Lael alive. In his statement to Detective Ridler, Hall indicated that he saw Lael at 2:30 p.m. on November 6th. At the evidentiary hearing he testified that he believes it would have been closer to 1:00 p.m.

However, there is nothing about this inconsistency that raises an issue with respect to Hall's truthfulness. First, it is not a material inconsistency. Hall has not changed his account from one that does not benefit Petitioner to one that does. Whether he saw Lael at Angie's Restaurant at 1:00 p.m. or 2:30 p.m. does not alter in any way the overall character of his statement or its significance. Second, all other relevant aspects of Hall's testimony are consistent with his statement to Detective Ridler; for example, that he was on his way to work when he stopped in at Angie's and that the day this occurred was Saturday. Third, there is a reasonable explanation for the discrepancy. After the passage of more than seventeen years it is not completely unexpected that Hall's recollection now about what he told Detective Ridler is different in a minor respect than the statement he provided in 1993. Based upon the Court's observations, Hall was simply doing his best to recall events that transpired many years ago. Finally, the fact alone that Hall would testify now that he believes he may have seen Lael at 1:00 p.m. instead of 2:30 p.m., when he could have easily refrained from saying anything inconsistent with what he told Detective Ridler in 1993, is also evidence of Hall's truthfulness. In short, no evidence was presented to suggest that Hall had any motive whatsoever to manufacture the

information he provided to Detective Ridler in 1993 or that the testimony he provided during the evidentiary hearing was a fabrication. In the Court's view, Hall testified truthfully about what he saw.

d) Conclusion on Time of Death

Taking into consideration the record of Petitioner's underlying criminal case and all of the evidence presented at the evidentiary hearings, the Court finds by clear and convincing evidence that Lael Brown was alive Saturday afternoon on November 6, 1993. Therefore, Petitioner could not have killed Lael Saturday morning. Nyman testified at the evidentiary hearing that she heard gun shots Sunday morning. While the Court has no reason to disbelieve her testimony, the Court ascribes to it relatively little weight given the fact that she testified at trial that she was nearly certain she heard gun shots Saturday morning. Nevertheless, Nyman's testimony constitutes some evidence establishing that Lael was alive Saturday afternoon because now there is no longer any clear evidence specifically pinpointing the time of Lael's death at 7:00 a.m. Saturday morning. Furthermore, Stanbridge testified at trial that she was working outside her home on Saturday from sometime in the morning to approximately 4:00 p.m. in the afternoon and indicated that she did not hear any gun shots. She further testified, however, that had there been gunshots she would have heard them. Again, this is at least some evidence that supports a finding that Lael was alive Saturday afternoon.

With respect to Carlsen, as the Court previously concluded, there are a variety of reasons to question his credibility, but there are also reasons suggesting that he is telling the truth. Nevertheless, while his claim of seeing Lael alive Saturday evening is certainly believable, the Court simply does not have a high degree of confidence that his testimony should be believed. This does not mean, however, that the Court must disregard Carlsen's testimony or that his

testimony has no evidentiary value whatsoever on the issue of time of death. Rather, it only means that the weight the Court is willing to afford his testimony will be directly proportional to the Court's confidence that he is telling the truth. Because the Court's confidence is low in this regard, Carlsen's testimony is not entitled to a significant amount of weight. But it is entitled to *some* weight. Thus, Carlsen's testimony constitutes some evidence in support of a finding that Lael was alive Saturday afternoon.

Finally, and most importantly, is Hall's testimony which, as previously explained, has never before been presented in any proceeding. In the Court's considered view, there is no question that Hall testified truthfully and that he was accurate in his statement that he saw Lael alive on Saturday afternoon. The significance of the evidence provided by Hall cannot be overstated. Unlike the circumstantial evidence presented by the State at trial that Lael was dead sometime Saturday morning, Hall's testimony and statement to police are direct evidence that Lael was alive Saturday afternoon. This is directly supported by Dr. Grey's testimony, based upon the physical evidence, that Lael's murder likely occurred sometime around 9:00 p.m. on Saturday and no later than 3:00 a.m. on Sunday.

It is particularly noteworthy that when Dr. Grey was asked at trial by the prosecution if it was "also true that the time of death could have been any time from the point when Lael Brown was last seen alive to the point that he was actually found dead," Dr. Grey responded by saying, "[t]hat is the most certain statement I can make." Clearly, in light of all the evidence which, in the Court's view, clearly and convincingly demonstrates that Lael was alive Saturday afternoon, if the most certain statement that can be made is that the time of death was sometime between the last time Lael was seen alive and when his body was discovered, he could not have been dead during the morning hours of Saturday, November 6th.

e) Evidence of Petitioner's Whereabouts

The State points out, however, that even if Petitioner did not kill Lael Saturday morning, she still could have caused his death sometime after Carlsen and Hall saw Lael alive. This is true, of course, unless Petitioner has adequately accounted for her whereabouts between 1:00 p.m. on Saturday and 3:00 am. on Sunday. In light of the evidence presented, the Court finds that she has. First, as an initial matter, although Dr. Grey testified that Lael was likely killed around 9:00 p.m. on Saturday, but no later than 3:00 a.m. on Sunday, no evidence has ever been presented even suggesting that it was Petitioner who committed the homicide during this timeframe. Second, following a comprehensive review of the record, one of the specific *facts* set forth by the Utah Supreme Court in its decision on Petitioner's direct appeal was that she "could account for her whereabouts *for the entire weekend* except the hours between 6:40 a.m. and 10 a.m. on Saturday, November 6." *Brown*, 948 P.2d at 340 (emphasis added). This is particularly noteworthy because the Supreme Court "review[ed] the record facts in a light most favorable to the jury's verdict." *Id.* at 338. Additionally, in addressing Petitioner's sufficiency of evidence claim, the Supreme Court stated that

> in determining whether [Petitioner] was involved in this murder, . . . the jury had the following evidence to consider: . . . (6) The defense was unable to establish [Petitioner's] whereabouts for the period between 6:40 a.m. on Saturday, when [Petitioner] was heard leaving a friend's house, where she had spent the night, and 10 a.m. on Saturday, when [Petitioner's] son saw his mother when he awoke. *The defense established the whereabouts of Debra Brown for the remaining period when the murder could have occurred.*

Id. at 345 (emphasis added).

Finally, based upon this Court's independent assessment of the record in the case, the contents of the various exhibits admitted at the evidentiary hearing, and Petitioner's own

unrebutted testimony,[18] it is clear that Petitioner's whereabouts are accounted for from 10:00 a.m. Saturday afternoon until Sunday morning at 3:00 a.m. At approximately 10:00 a.m. on Saturday, Petitioner's son Ryan Buttars saw his mother when he awoke. Shortly thereafter, at approximately 10:20 a.m., Brent Skabelund, who was Petitioner's boyfriend at the time, arrived at Petitioner's home to accompany her to her son's basketball game at Skyview High School in Smithfield. They left for the game at approximately 10:40 or 10:45 a.m. From 11:00 a.m. to 12:15 p.m., Petitioner and Skabelund watched the basketball game. Following the game, she and Skabelund stopped at R&G's, a local drive-in, for lunch. After lunch, Skabelund took Petitioner to her house where she took a nap. Between 2:00 and 3:00 p.m. Petitioner delivered chicken soup to Lael's house, possibly her daughter's house as well, and then went to a new store at the Pine Crest shopping area. She then went back home and called Skabelund around 4:00 p.m.[19] At 4:30 p.m., Skabelund drove to Petitioner's home, and together they went shopping at Macey's grocery store. They then went back to Petitioner's home to put away the groceries at approximately 5:40 p.m. and had pizza for dinner that Petitioner's sons brought home.

[18] Given Petitioner's obvious interest in the outcome of the Court's factual innocence determination, her evidentiary hearing testimony must be viewed with some skepticism. However, based upon a careful consideration of her testimony, the Court finds that her statements were credible. In the Court's view, the manner in which Petitioner testified and her demeanor on the witness stand did not suggest that she was lying or simply providing self-serving responses. In addition, despite having denied for years that she stole money from Lael, she candidly admitted that she had, if fact, forged checks belonging to Lael as the State alleged at trial. She also provided a believable account of her whereabouts on Saturday. Importantly, her testimony was internally consistent. She did not testify to one version of events on direct examination and then a slightly altered version of events on cross-examination. Finally, Petitioner's version of events has basically remained unchanged since 1993 and is materially consistent with facts provided by third parties. Overall, the Court finds that Petitioner testified truthfully at the evidentiary hearing.

[19] It is also important to point out at this juncture that even though Petitioner may have been alone during a portion of the afternoon on Saturday, no evidence has ever been presented establishing that Lael was killed during the time period she was by herself. To the contrary, evidence was presented suggesting that Lael was not killed during this timeframe. Kimberly Stanbridge, who was a neighbor of Lael's, indicated that she was outside working around her house from sometime Saturday morning until approximately 4:00 p.m. Saturday afternoon. She stated that she did not hear any gunshots while she was outside, and that had there been gunshots, she would have heard them.

Skabelund stayed at Petitioner's residence until approximately 6:45 p.m., and then they both drove to Skabelund's house to watch movies. They arrived there around 7:00 p.m. Petitioner fell asleep at 8:00 or 8:30 p.m. while she was watching the movie and slept until midnight. At midnight she awoke and drove herself home. After arriving home she saw her two sons who were playing video games. Petitioner went to bed shortly after midnight Sunday morning. Buttars indicated that his mother stayed at home the rest of the night.

Significantly, no evidence was presented to suggest that the foregoing account of Petitioner's whereabouts is inaccurate. Nor was evidence presented suggesting that the chronology set out above has changed in any way since 1993. Based upon the foregoing accounting, and recognizing that it is virtually impossible to chronicle every minute of one's life, given the extended periods of time on Saturday that Petitioner was in the presence of others, the Court finds by clear and convincing evidence that Petitioner's whereabouts from Saturday afternoon on November 6th to the early morning hours of Sunday, November 7th, have been firmly established.

f) Conclusion on Factual Innocence

The Court finds by clear and convincing evidence that Lael was alive Saturday afternoon on November 6th and, therefore, that Petitioner could not have killed Lael Saturday morning. Furthermore, the Court also finds by clear and convincing evidence that Petitioner has established her whereabouts for Saturday afternoon and early Sunday morning and, therefore, that she could not have killed Lael during the remaining time period when the murder could have occurred. Accordingly, the Court now determines by clear and convincing evidence that Petitioner did not engage in the conduct for which she was convicted and is, therefore, factually innocent of the aggravated murder of Lael Brown.

ORDER

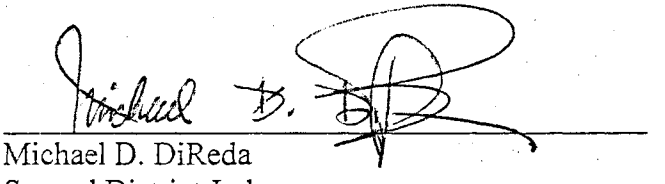
IT IS HEREBY DETERMINED that Petitioner is factually innocent of the offense of Aggravated Murder for which she was previously convicted.

IT IS HEREBY ORDERED that Petitioner's conviction for Aggravated Murder is vacated with prejudice.

This Memorandum Decision and Order constitute the final order of the Court with respect to the determination of factual innocence. No further order is necessary to effectuate the Court's decision.

DATED this 2nd day of May, 2011.

BY THE COURT:



Michael D. DiReda
Second District Judge

Certificate of Delivery

I certify that a true and correct copy of the foregoing **Memorandum Decision Re: Post-Conviction Determination of Factual Innocence** was mailed, faxed, or hand-delivered on the 2nd day of May, 2011, to the following:

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Deputy Clerk

Addendum E

948 P.2d 337
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Debra BROWN, Defendant and Appellant.

No. 960041. | Oct. 24, 1997.

Defendant was convicted in the First District Court, Cache County, Gordon J. Low, J., of aggravated murder, and she appealed. The Supreme Court, Russon, J., held that: (1) refusal to admit polygraph results proffered by defendant was not abuse of discretion; (2) court would not review prosecutor's comments during closing for plain error; and (3) circumstantial evidence supported conviction.

Stewart, Associate C.J., dissented with opinion.

West Headnotes (20)

1 **Criminal Law**
⇐ Construction of Evidence

On appeal, Supreme Court reviews record facts in light most favorable to jury's verdict.

8 Cases that cite this headnote

2 **Criminal Law**
⇐ Lie Detector or Polygraph Tests and Procedures

Refusal to admit polygraph results proffered by murder defendant was not abuse of discretion; defendant failed to proffer any recent studies either showing wider acceptance of polygraph in scientific or legal communities or revealing information that would lend itself to finding of inherent reliability. Rules of Evid., Rule 702.

3 **Criminal Law**
⇐ Discretion

Criminal Law
⇐ Admissibility

Trial court has wide discretion in determining admissibility of expert testimony, and such decisions are reviewed under abuse of discretion standard; exercise of discretion necessarily reflects personal judgment of court, and appellate court can properly find abuse only if no reasonable person would take view adopted by trial court. Rules of Evid., Rule 702.

2 Cases that cite this headnote

4 **Criminal Law**
⇐ Experiments and Tests: Scientific and Survey Evidence

Criminal Law
⇐ Knowledge, Experience, and Skill

To make threshold showing of inherent reliability of scientific evidence, proponent may either show general acceptance of principle or technique in relevant scientific community, in which case court may take judicial notice, or proffer sufficient foundation to demonstrate inherent reliability of underlying principles and techniques; foundational showing must explore with careful precision such questions as correctness of scientific principles underlying testimony, accuracy and reliability of techniques utilized, and qualifications of those actually gathering data and analyzing it. Rules of Evid., Rule 702.

3 Cases that cite this headnote

5 **Criminal Law**
⇐ Matters involving scientific or other special knowledge in general

If proponent of scientific evidence can satisfy threshold requirement of inherent reliability, court must then determine whether there is adequate foundation for proposed testimony, i.e., that scientific principles or techniques have been properly applied to facts by qualified persons and that testimony is founded on that work. Rules of Evid., Rule 702.

3 Cases that cite this headnote

6 **Criminal Law**
⇐ Matters involving scientific or other special knowledge in general

If trial court is satisfied both that proffered scientific evidence is inherent reliable and

that there is adequate foundation for proposed testimony, court must then balance probative value of proffered evidence against dangers its admittance poses. Rules of Evid., Rules 403, 702.

1 Cases that cite this headnote

7 **Criminal Law**
⇐ Judicial Notice

Criminal Law
⇐ Lie Detector or Polygraph Tests and Procedures

Admission of polygraph evidence is not appropriate for judicial notice; in absence of sufficient foundational showing of inherent reliability and satisfaction of remaining two prongs of *Rimmasch,* stipulation between parties is the only way polygraph evidence may be admitted. Rules of Evid., Rule 702.

8 **Criminal Law**
⇐ Experiments and Tests; Scientific and Survey Evidence

Burden is on party proffering scientific evidence to demonstrate that it has requisite degree of reliability. Rules of Evid., Rule 702.

9 **Criminal Law**
⇐ Experiments and Tests; Scientific and Survey Evidence

Preliminary questions concerning admissibility of evidence should be established by preponderance of proof.

1 Cases that cite this headnote

10 **Criminal Law**
⇐ Hearing, ruling, and objections

Evidentiary hearing is not required per se for admission of polygraph evidence, so long as parties sufficiently document their proffers to court. Rules of Evid., Rule 702.

11 **Criminal Law**
⇐ Arguments and conduct in general

Given that defense counsel strategically chose not to object to prosecutor's comments during closing, appellate court would not review for plain error. Rules of Evid., Rule 103(a)(1).

1 Cases that cite this headnote

12 **Criminal Law**
⇐ Necessity of Objections in General

Plain error rule exists to permit review of trial court rulings as way of protecting defendant from harm that can be caused by less-than-perfect counsel, but purpose of that rule is in no way implicated if defense counsel consciously elects to permit evidence to be admitted as part of defense strategy, rather than through inadvertence or neglect. Rules of Evid., Rule 103(a)(1).

7 Cases that cite this headnote

13 **Criminal Law**
⇐ Construction of Evidence

Criminal Law
⇐ Inferences or deductions from evidence

Criminal Law
⇐ Reasonable doubt

In considering insufficiency of evidence claim, appellate court reviews evidence and all inferences which may reasonably be drawn from it in light most favorable to verdict of jury, and reverses only when evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained reasonable doubt that defendant committed crime of which he or she was convicted.

15 Cases that cite this headnote

14 **Criminal Law**
⇐ Credibility of Witnesses

Credibility is issue for trier of fact.

15 **Criminal Law**
⇐ Construction of Evidence

Generally, in reviewing jury verdict, appellate court assumes that jury believed evidence supporting verdict.

3 Cases that cite this headnote

16 **Criminal Law**

⇐ Approval of verdict by trial court

Trial court's consideration of defendant's insufficiency of evidence claim in denying motion for new trial lent further weight to jury's verdict.

17 **Criminal Law**

⇐ Circumstantial Evidence

Criminal Law

⇐ Circumstantial evidence

Conviction can be based on sufficient circumstantial evidence; in such case, appellate court must determine whether there is any evidence that supports each and every element of crime charged, and whether inferences that can be drawn from that evidence have basis in logic and reasonable human experience sufficient to prove each legal element of offense beyond reasonable doubt.

13 Cases that cite this headnote

18 **Criminal Law**

⇐ Inferences from evidence

Guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.

1 Cases that cite this headnote

19 **Homicide**

⇐ First Degree, Capital, or Aggravated Murder

Homicide

⇐ Predicate offenses or conduct

Homicide

⇐ Miscellaneous particular circumstances

Homicide

⇐ Motive

There was sufficient circumstantial evidence that defendant shot victim during burglary and/or for pecuniary gain to support aggravated murder conviction; it was not unreasonable for jury to have found that defendant had stolen from victim, since she benefited directly from forged checks, that she had motive to kill victim because he was likely to go to police when he discovered checks, that she knew of existence of victim's gun, that she used gun to shoot victim in head while he slept at about 7 a.m., when she could not account for her whereabouts, and that she then departed with financial records and gun that incriminated her.

1 Cases that cite this headnote

20 **Criminal Law**

⇐ Inferences from evidence

Jury may choose which among several reasonable inferences to believe.

Attorneys and Law Firms

*338 Jan Graham, Atty. Gen., J. Frederic Voros, Jr., Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.
John T. Caine, Ogden, and Shannon R. Demler, Logan, for defendant and appellant.

Opinion

RUSSON, Justice:

Defendant Debra Brown was convicted by a jury in Cache County of aggravated murder. Brown appeals her conviction, claiming that (1) the trial court incorrectly barred admission of the results of a polygraph examination; *339 (2) the trial court's failure to intervene when the prosecutor made certain comments during his closing arguments was plain error; and (3) the evidence was insufficient to support the jury's verdict.

I. BACKGROUND

1 On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. *State v. Johnson*, 821 P.2d 1150, 1153 (Utah 1991).

On the morning of November 7, 1993, the Logan City Police Department received a 911 call from defendant stating that she had found her employer dead in his home. Both emergency medical personnel and police officers responded to the call. Upon arrival, the officers found Debra Brown, who was emotionally distraught, on the porch outside the home. Inside, they found the body of Lael Brown,[1] who had been shot in the head. Mr. Brown was in his bed with a blanket and a sheet pulled up to his shoulder. Initially, police thought the death might have been a suicide; however, when they did not find a gun, they began treating the investigation as a murder.

Debra Brown told police investigators she had worked for Lael Brown in his apartment rental business. She stated that Mr. Brown had been ill and she had delivered a pot of soup to his home on Saturday afternoon, November 6. When she knocked on the door and received no answer, she left the soup on Mr. Brown's porch with a note. She returned Sunday morning to check on Mr. Brown and found the soup still on the porch. Again there was no response to her knocks on the door. At that point, she returned to her truck, retrieved a key to Mr. Brown's home, and let herself into the home, where she discovered his body and then called the police. The pot of soup with the note was still on the porch when police officers arrived.

Investigators determined that there had not been a forced entry into the home nor was the house ransacked. Items of value such as the television and various guns that were in plain view were also still in the home. The only obviously missing item was Mr. Brown's wallet. Police officers questioned Debra Brown several times that day and searched her truck and her purse.

An autopsy revealed that Mr. Brown had been shot three times with a .22 caliber handgun, and tests suggested that the murder weapon may have been a Colt Woodsman. Police learned that Mr. Brown owned a .22 caliber Colt Woodsman handgun that was missing. Neither the Colt Woodsman nor any other murder weapon was ever found.

An analysis of Mr. Brown's home revealed traces of blood around the kitchen sink and a small hand print on the front door. Police never matched the hand print to Debra Brown, and no traces of blood were found on her clothes. No physical evidence linking Debra Brown to the murder was ever discovered.

However, when Mr. Brown's family began working on his estate for probate purposes, they discovered that his October 1993 bank statement and several canceled checks were missing. They also discovered that several checks written in the preceding months were missing. This discovery made the family suspicious because Mr. Brown was known for keeping complete financial records. Upon further investigation, police determined that the missing checks from prior months were payable to Debra Brown. They also learned that several checks written to Debra Brown had cleared the bank during the month of October. When police obtained copies of these checks from the bank, they suspected that several of the checks payable to Debra Brown were forgeries. An expert document examiner evaluated copies of the checks along with other financial records and confirmed the forgeries. Defendant's home was searched, but none of the missing financial records were ever located. When the bank issued the November statement, police found that another forged check payable to Debra Brown had been negotiated on November 2.

On the basis of a neighbor's statement about hearing gunshots, police thought the murder occurred at approximately 7 a.m. on *340 Saturday, November 6, 1993. Defendant could account for her whereabouts for the entire weekend except the hours between 6:40 a.m. and 10 a.m. on Saturday, November 6.

Throughout the investigation, Debra Brown willingly cooperated with investigators. She was interviewed by police officers more than twenty times in the three months following the murder and consistently denied involvement.

Defendant was charged by information with aggravated murder on September 12, 1994. On appeal, she (1) challenges the trial court's ruling barring admission of polygraph results, (2) claims the trial court erred when it failed to address the prosecutor's remarks during closing argument, and (3) challenges the sufficiency of the evidence.

II. POLYGRAPH

[2] During the investigation and prior to being charged, defendant voluntarily consented to a polygraph examination requested by the Logan City Police Department. In the course of this examination, the following colloquy between the examiner and Brown transpired:

> Q. Regarding the question about Lael's death, do you intend to tell the truth to each question about that?
>
> A. Yes.
>
> Q. Did you yourself cause Lael's death?

A. No.

Q. Did you conspire with anyone to cause Lael's death?

A. No.

Q. Do you know for sure who caused Lael's death?

A. No.

Before trial, Brown sought a court order allowing testimony about the results of the polygraph. The district court, after hearing the parties' proffers, denied Brown's request and, in fact, granted the State's request barring mention of the polygraph examination at trial. Brown claims that the court erred in refusing to allow testimony about the polygraph examination.

3 "The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993). "[T]he exercise of discretion ... necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if ... no reasonable [person] would take the view adopted by the trial court." *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978).

4 *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), sets forth a three-part standard for admitting scientific evidence under Utah Rule of Evidence 702.[2] *Rimmasch* first requires a threshold showing of inherent reliability. *Id.* at 398. A proponent may either show a general acceptance of the principle or technique in the relevant scientific community or proffer a sufficient foundation to demonstrate the inherent reliability of the underlying principles and techniques. *Id.* at 400. If the proponent can show general acceptance, the court may take judicial notice and admit the evidence subject to the requirements discussed below. *Id.* However, if the subject is not suitable for judicial notice, the

> foundational showing must explore with careful precision such questions as the correctness of the scientific principles underlying the testimony, the accuracy and reliability of the techniques utilized in applying the principles to the subject matter before the court and in reaching the conclusion expressed in the opinion, and the qualifications of those actually gathering the data and analyzing it.... Only with such information can the overall decision on admissibility be made intelligently. In the absence *341 of such a showing by the proponent of the evidence and a determination by the court as to its threshold reliability, the evidence is inadmissible.

Rimmasch, 775 P.2d at 403; *see also Phillips v. Jackson*, 615 P.2d 1228, 1233-36 (Utah 1980).

5 If the proponent can satisfy this threshold requirement of inherent reliability, only then need the court consider the remaining two steps. *Id.* at 398 n. 7. *Rimmasch*'s second requirement is a "determination that there is an adequate foundation for the proposed testimony, i.e., that the scientific principles or techniques have been properly applied to the facts of the particular case by qualified persons and that the testimony is founded on that work." *Id.*

6 Finally, if the court is satisfied regarding this second determination, it must balance the probative value of the proffered evidence against the dangers its admittance poses under rule 403 of the Utah Rules of Evidence. *Id.* at 398 n. 8. *Rimmasch* also points out that "when the inferences from the scientific evidence sweep broadly or cut deeply into sensitive areas, a stronger showing of probative value should be required. Such a 'sensitive area' is one central to the core of the fact-finding process-whether one witness or another is telling the truth." *Id.* at 399 n. 8 (citations omitted).

7 8 9 Our past cases make clear that at the present time, the admission of polygraph evidence is not appropriate for judicial notice.[3] *See State v. Eldredge*, 773 P.2d 29, 37 (Utah 1989) (requiring stipulation for admission of polygraph results). In the absence of a sufficient foundational showing of inherent reliability and satisfaction of the remaining two prongs of *Rimmasch*, a stipulation between the parties is the only way polygraph evidence may be admitted. Thus, Brown was required to lay the foundation by presenting evidence of inherent reliability. "[T]he burden is on the party proffering the evidence to demonstrate that it has the requisite degree of reliability." *Rimmasch*, 775 P.2d at 407. Preliminary questions concerning the admissibility of evidence should be established by a preponderance of proof. *Daubert*, 509 U.S. at 592 n. 10, 113 S.Ct. at 2796 n. 10.

The parties submitted the issue to the court only on briefs outlining their positions and proffers made to the judge in chambers; no evidentiary hearing was held. In support of admission, Brown proffered the testimony of the administering polygrapher, claiming he would testify that Debra Brown had been truthful. In addition, the defense offered an affidavit from Dr. David Raskin, a noted polygraph authority, and the testimony of a Davis County Sheriff's office polygraph expert. Brown stresses that the Logan City

Police Department requested the examination and, when she voluntarily submitted to the examination, she had neither been charged with any crime nor consulted an attorney.

In opposition to admission, the State proffered the testimony of David Liken of the University of Minnesota, claiming that he would testify about problems with the test. The State also claims that the police did not use the polygraph as a means for detecting truth but as an aid in an attempt to obtain a confession. The State argues that there was no evidentiary hearing on this matter.

10 In the absence of an evidentiary hearing, an initial question is whether the record before this court contains a sufficient reflection of the proffers. Although an evidentiary hearing would have created a more complete record for review, a hearing is not required per se so long as the parties sufficiently document their proffers to the court. In view of the record and the briefs filed with this court, we are convinced that Brown failed to proffer any recent studies either showing a wider acceptance of the polygraph in the scientific or legal communities or revealing information that would lend itself to a finding of inherent reliability.

*342 Brown states that the polygrapher would have testified that he conducted the exam using all appropriate standards, that he was an experienced polygrapher, and that his findings were reliable. While confidence in the methodology and reliability of his examination is important (supporting *Rimmasch*'s second requirement), this fails to explain with sufficient precision any *reason* for its reliability or how the test meets the requirements of Utah Rule of Evidence 702. Similarly, Dr. Raskin would have testified as to the reliability of the test under proper conditions and with proper training of the polygrapher. This proffer has been submitted to courts previously, and Brown fails to state Dr. Raskin's intention of presenting the court with recent studies that shed new light on the polygraph in a forensic setting.

On the basis of Brown's representations, neither of these witnesses would have been able to meet the inherent reliability standard. Further, the fact that the Logan City police requested the polygraph or that Brown had not been charged and had not consulted an attorney adds nothing to the question of the inherent reliability of the polygraph.

On appeal, Brown directs our attention to *United States v. Posado*, 57 F.3d 428 (5th Cir.1995), as holding that advances in polygraph technique have made it sufficiently reliable. Our reading of *Posado* does not support Brown's position. In *Posado*, the defendants sought to introduce polygraph evidence in support of their motion to suppress. The district court "summarily refused to consider the polygraph testimony and also refused to consider whether the testimony was reliable and relevant." *Id.* at 431. Defendant Posado appealed, claiming that *Daubert* required a hearing on the admissibility of the polygraph evidence. *Id.*

The Fifth Circuit, however, recognized that its precedent barring polygraph evidence per se did not survive *Daubert*. *Id.* at 429. The court, "with a high degree of caution," remanded on the issue of admissibility and required the district court to conduct a full *Daubert* hearing. *Id.* at 436. Contrary to Brown's claims, the *Posado* court specifically did not express any opinion whether polygraph evidence possesses sufficient evidentiary reliability and relevance to be admissible or whether the polygraph is scientifically valid. *Id.* at 429, 434. [4]

Brown also claims that the judge did not follow the *Crosby* standards in considering her motion to admit the polygraph evidence. However, Brown concedes in her brief that the trial court relied primarily on *Rimmasch* in determining the polygraph evidence was inadmissible. At the time the district court considered the matter, *Crosby* had not been decided and *Rimmasch* was our most recent statement of the law. Thus, the trial judge correctly followed existing law. Moreover, as already stated, *Crosby* did not change the *Rimmasch* standard.

In his memorandum decision, the district judge recognized that there is no general acceptance of the polygraph, and he discussed several areas of concern including methodology, reliability, and the risk at trial of focusing on the credentials of the experts. The court also discussed the third step of *Rimmasch*, that is, the danger of unfair prejudice under Utah Rule of Evidence 403. "[T]he Rules of Evidence-especially Rule 702-do assign the trial Judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597, 113 S.Ct. at 2798. We find that the trial court properly applied the *Rimmasch* tests and that the district court did not abuse its discretion in refusing to admit the polygraph results.

III. PROSECUTOR'S COMMENTS DURING CLOSING

11 Brown claims that the prosecutor made certain comments during his closing *343 rebuttal that improperly shifted the burden of proof and called the jury's attention to her decision not to testify. At trial, defense counsel chose not to object to these comments for "strategic reasons." On appeal, Brown claims that the court's failure to respond to the prosecutor's

statements sua sponte is plain error. The State claims that Brown's failure to object at trial waived her right to appeal this issue.

12 Generally, we will review objections raised for the first time on appeal for plain error. Utah R. Evid. 103(a)(1); *State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989). However, *State v. Bullock*, 791 P.2d 155, 158-59 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990), raises an exception where counsel strategically chooses not to object:

> [W]e do not appraise all rulings objected to for the first time on appeal under the plain error doctrine.... *[I]f a party through counsel has made a conscious decision to refrain from objecting* or has led the trial court into error, *we will then decline to save that party from the error*.... The necessity for an appellate court's following such an approach is obvious when the consequences of the alternative are considered. If trial counsel were permitted to forego objecting to evidence as part of a trial strategy that counsel thinks will enhance the defendant's chances of acquittal and then, if that strategy fails, were permitted to claim on appeal that the Court should reverse because it was plain error for the court to admit the evidence, we would be sanctioning a procedure that fosters invited error. Defendants are thus not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal.

Id. (citations omitted) (emphasis added). Circumstances like these are precisely why "courts are not required to constantly survey or second-guess the nonobjecting party's best interests or trial strategy." *State v. Labrum*, 925 P.2d 937, 939 (Utah 1996). If trial counsel intentionally fails to object, the trial judge is put in the untenable position of deciding whether to intervene and potentially interfere with trial counsel's strategy or face review for plain error.

> The plain error rule exists to permit review of trial court rulings as a way of protecting a defendant from the harm that can be caused by less-than-perfect counsel. But the purpose of that rule is in no way implicated if defense counsel consciously elects to permit evidence to be admitted as part of a defense strategy rather than through inadvertence or neglect.

Bullock, 791 P.2d at 159 (citations omitted). It is "our long-established policy that the trial court should have the first opportunity to address the claim of error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). We in no way dictate the appropriate strategy for the trial attorney to pursue in any given situation.[5] Since Brown strategically chose not to object, we decline to review for plain error.

IV. SUFFICIENCY OF THE EVIDENCE

13 14 15 16 Brown's final claim is that the evidence was insufficient to support the jury's finding that she murdered Lael Brown either in the commission of a burglary or for pecuniary gain. In considering an insufficiency of the evidence claim,

> we review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he [or she] was convicted.

State v. Petree, 659 P.2d 443, 444 (Utah 1983). "As we have often said, credibility is an issue for the trier of fact, in this case the jury.... Moreover, as a general rule, in reviewing a jury verdict we assume that the jury believed the evidence supporting the *344 verdict." *Dunn*, 850 P.2d at 1213. "We note that the trial court considered defendant's insufficiency of the evidence claim in denying the motion for a new trial. This action lends further weight to the jury's verdict." *Johnson*, 821 P.2d at 1156. Brown faces a high hurdle in establishing this claim.

Brown was charged with aggravated murder. Thus, the State had the burden of proving beyond a reasonable doubt that Brown intentionally or knowingly caused the death of another under circumstances where at least one of several aggravating factors listed in the statute are present. Utah Code Ann. § 76-5-202 (Supp.1994). The State relied on two aggravating factors: (1) commission of a homicide while the defendant was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit burglary, Utah Code Ann. § 76-5-202(1)(d) (Supp.1994); and/or (2) commission of a homicide for pecuniary gain. Utah Code Ann. § 76-5-202(1)(f) (Supp.1994).

17 18 Initially, we note that there was no direct evidence that Debra Brown committed the murder. The State's case was based solely on circumstantial evidence. However, a conviction can be based on sufficient circumstantial evidence. *See State v. Rebeterano*, 681 P.2d 1265, 1267 (Utah 1984). In such a case, we must

determine (1) whether there is any evidence that supports each and every element of the crime charged, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt. A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.

State v. Workman, 852 P.2d 981, 985 (Utah 1993).

19 There is no dispute that whoever murdered Lael Brown did so intentionally. Mr. Brown was shot three times in the head from close range, each shot being potentially fatal. Clearly, there was sufficient evidence to establish that Lael Brown's death had been intentionally or knowingly caused.

In determining whether defendant was involved in this murder, the jury was required to consider all the evidence before it, along with the logical and reasonable inferences that could be drawn therefrom. The jury had the following evidence to consider:

(1) There were no signs of a forced entry into Mr. Brown's home or any signs of a struggle or fight in the home. Police officers found the back door secured from inside the home, and there was no indication that it had been opened. Mr. Brown always kept his doors locked, and the front door locked automatically whenever it closed.

(2) There were only two known keys to the house-Mr. Brown's key, which was found in his pants pocket, and the key Debra Brown had. Indeed, Debra Brown told police officers that she gained access to Mr. Brown's home with her key when she claimed to have discovered the body. While defendant raised questions regarding others who may have had keys to Mr. Brown's home and whether Mr. Brown may have willingly let his killer into his home, there was no evidence in this regard, and the fact remains that Debra Brown had a key and thus had access to Mr. Brown's home.

(3) Debra Brown was an employee and a friend of Lael Brown and had been in his home often. In fact, on one occasion when Mr. Brown was on vacation, Debra Brown thoroughly cleaned and painted Mr. Brown's home.

(4) Mr. Brown was shot with a .22 caliber handgun. An expert testified that from an examination of the bullets that killed Lael Brown, the murder weapon may have been any one of several different brands and models of guns, including a .22 caliber Colt Woodsman. Mr. Brown owned a Colt Woodsman that was reported missing after the murder. The same brands of bullets that killed Mr. Brown were found in a drawer in his bedroom.

(5) The medical examiner testified that the time of death was likely between 9 p.m. Friday, November 5, and 3 a.m. Sunday, November 7. He based his testimony on physical findings and evidence that Mr. ***345** Brown was last seen alive Friday evening, November 5; that he failed to follow his usual routine of visiting with friends at a local restaurant Saturday morning; that he did not answer his telephone from as early as 9:30 a.m. Saturday; and that his truck was seen parked in his driveway all day Saturday although no one saw him working around his home, which was his usual routine.

(6) The defense was unable to establish Debra Brown's whereabouts for the period between 6:40 a.m. on Saturday, when defendant was heard leaving a friend's house, where she had spent the night, and 10 a.m. on Saturday, when Debra Brown's son saw his mother when he awoke. The defense established the whereabouts of Debra Brown for the remaining period when the murder could have occurred.

(7) A neighbor who lived just behind Mr. Brown testified that she heard two "pops" that she believed to be gunshots on Saturday at approximately 7 a.m. The neighbor said she heard these shots as she brought her head up out of the water while bathing. The defense presented testimony from Mr. Brown's next door neighbor, a former police officer, who testified that he heard no gunshots that morning. This neighbor was waking his family early Saturday morning in preparation for a family outing.

(8) The only property missing from Mr. Brown's residence were his October bank statement and canceled checks, several canceled checks from previous months, his .22 caliber Colt Woodsman, and his wallet. Copies of the October bank statement and canceled checks obtained from the bank revealed that several checks were made payable to defendant but were, in fact, forgeries, i.e., someone had traced Lael Brown's signature onto these checks.

(9) Bank representatives testified that the October statement was mailed to Mr. Brown prior to his death. The postmaster testified that given the potential mailing dates, it was ninety-seven percent likely that Lael Brown had received the statement and canceled checks before he was last seen alive.

(10) Mr. Brown was fastidious with his financial records. His son testified that he was able to reconstruct Mr. Brown's entire

financial history dating back to the 1970s. Family members and several of Mr. Brown's friends testified that Mr. Brown would likely have confronted someone who violated his trust and he would likely have gone to the police.

(11) In Debra Brown's original statement to the police, she stated that she had left the soup on Mr. Brown's porch because she did not want to disturb him. However, in a later statement, she stated she left the soup on the porch because she thought he was not home and she did not want to go inside.

(12) Police officers testified that when they arrived at Mr. Brown's residence, Debra Brown was emotionally distraught. A neighbor who looked after defendant immediately after the discovery testified similarly. Debra Brown's boyfriend, who came to the scene shortly after the discovery, also testified that she was very upset.

20 From this evidence, the jury found defendant guilty of aggravated murder, that is, that she intentionally killed Lael Brown while committing burglary and/or killed him for pecuniary gain. Since no one saw defendant shoot the victim, and since the murder weapon has never been found, such finding had to be based upon the evidence and the reasonable inferences drawn therefrom. "A jury may choose which, among several reasonable inferences, to believe." *Workman*, 852 P.2d at 987. In reviewing the evidence, we conclude that it was not unreasonable for the jury to infer from the evidence the following:

(1) Because Lael Brown's residence was intact, without signs of forced entry, whoever killed him gained entrance either by the use of a key or by Lael Brown's opening the door himself. And since there were no signs of struggle or a fight within the residence, and since Lael Brown was found dead in his bed, it is likely that entrance to the house was gained by someone who had a key and that Lael Brown was shot while asleep or before he could react.

(2) Because the medical examiner determined that Lael Brown was killed sometime between 9 p.m. on Friday and 3 a.m. on ***346** Sunday and a neighbor heard the sound of gunshots at about 7 a.m. on Saturday, Lael Brown was shot around 7 a.m. on Saturday.

(3) Because the make and model of Lael Brown's missing gun were consistent with the possible murder weapon and the bullets that killed him were the same brands he used, Lael Brown was killed with his own gun.

(4) Because defendant had been in Lael Brown's home on many occasions, at least once to clean and paint while Mr. Brown was away, she was in a position to have known where Mr. Brown kept his guns and his financial papers.

(5) Because the only items stolen from Lael Brown were his wallet, his hand gun, and the October bank statement containing canceled checks, including several checks payable to defendant that were found to be forgeries, and because no other property was missing, the person removing those items from the home would have had a personal interest in them, and defendant, because of the forgeries, had a personal interest in obtaining those canceled checks.

(6) Defendant gave inconsistent statements to the police. She originally informed them that she had left soup on Mr. Brown's porch because she did not want to disturb him. Later, she stated that she had left the soup on the porch because she thought he was not at home and did not want to go inside. It was not unreasonable for the jury to wonder why in either case she would leave soup on the porch where it could go bad instead of leaving it inside in the refrigerator since she had a key to enter the residence.

(7) The defense could not account for defendant's whereabouts at about 7 a.m., when the neighbor heard the gunshots, but was able to explain her whereabouts prior to 6:40 a.m. on Saturday and after 10 a.m. on Saturday.

(8) Because Lael Brown and defendant were the only two persons known to have keys to the house and it was likely that whoever killed Lael Brown entered by opening the door with a key, defendant was that person.

In view of all the evidence and the reasonable inferences drawn therefrom, it was not unreasonable for the jury to have found that defendant had stolen from Lael Brown since she benefited directly from the forged checks, that she had a motive to kill Lael Brown because he was likely to go to the police when he discovered the checks, that she knew of the existence of Mr. Brown's gun, that she took the gun and, while he was asleep, shot him dead at about 7 a.m. (when she could not account for her whereabouts and when the neighbor heard gunshots), that she then departed with the financial records and the gun that incriminated her, and that such constituted the intentional taking of a human life during a burglary and/or for pecuniary gain in violation of the law. Thus we cannot say that the evidence was so inconclusive and inherently improbable that the jury could not have found

that each element of the crime had been established beyond a reasonable doubt.

V. CONCLUSION

For the foregoing reasons, we affirm the conviction.

ZIMMERMAN, C.J., and HOWE and DURHAM, JJ., concur in Justice RUSSON's opinion.

STEWART, Associate C.J., dissents.

STEWART, Associate Chief Justice, dissenting:

In my view, we should revisit the admissibility of polygraph evidence. That has not been done with any degree of careful assessment of the state of the art of polygraphy or, more importantly, of its potential for helping to eliminate undetectable error in the subjective assessment of a defendant's credibility on the basis of the defendant's demeanor. There is no scientific basis whatsoever, that I am aware of, for concluding that judges or juries are able to make unerringly valid judgments as to credibility on the basis of demeanor, notwithstanding the long-held assumption, and even presumption, that they can do so. Indeed, what evidence there is strongly suggests frequent error. Surely, there is no paucity of evidence in legal literature *347 to the effect that horrendous mistakes have been made from time to time because of faulty credibility assessments.

Although polygraph test evidence is not foolproof, it is a mistake to assume that all scientific evidence is. *See, e.g.,* *Kofford v. Flora*, 744 P.2d 1343 (Utah 1987). Moreover, polygraph evidence is more like an expert's opinion based on a generally accepted technique or test than a scientific test based on principles of physics, chemistry, or another hard science. In truth, courts admit much expert opinion based on statistical correlations, standardized psychological tests, and even an expert's own practical or clinical experience.

I think a defendant, and perhaps the prosecution, should have the right under certain circumstances to use the result of such a test, rather than having credibility decided solely on the basis of a nonreviewable, highly subjective judgment as to one's demeanor. It is noteworthy that *State v. Crosby*, 927 P.2d 638 (Utah 1996), indicated that the issue has not been disposed of for all time.

Parallel Citations

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Footnotes

1 Lael Brown and Debra Brown are not related.

2 Our recent decision in *State v. Crosby*, 927 P.2d 638 (Utah 1996), decided while this appeal was pending, reaffirmed *Rimmasch* and our interpretation of the admissibility of scientific evidence (specifically, the admissibility of polygraph examinations) in light of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Inasmuch as *Crosby* reaffirms the *Rimmasch* standard and does not add any further requirements to *Rimmasch*, this opinion will address Brown's concerns under *Rimmasch*. The reader is referred to *Crosby* for a full discussion of the interrelationship of *Daubert*, *Rimmasch*, and polygraph evidence.

3 *See also* *Crosby*, 927 P.2d at 642-43 (noting that in other jurisdictions polygraph evidence either is inadmissible per se or requires a stipulation). *But see* *State v. Tillman*, 750 P.2d 546, 557 (Utah 1987) (developments in area of polygraph examinations may in future progress to point where polygraph tests should be held admissible irrespective of stipulation).

4 On remand in the *Posado* matter, the trial court held that the polygraph evidence was inadmissible, citing problems with reliability, relevance, and rule 403. *United States v. Ramirez*, 1995 WL 918083 (S.D.Tex. Nov.17, 1995). We also note that Fifth Circuit cases after the *Posado* decision rejected admission of the polygraph. *See, e.g.,* *United States v. Zertuche-Tobias*, 953 F.Supp. 803, 807 (S.D.Tex.1996) (citing problems with both reliability and methodology); *United States v. Dominguez*, 902 F.Supp. 737 (S.D.Tex.1995) (subjectivity of procedure involved is concern to court).

5 This court will not review for error a trial attorney's strategic decisions unless the error falls below the standard of reasonable professional practice. *See* *Dunn*, 850 P.2d at 1220.

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